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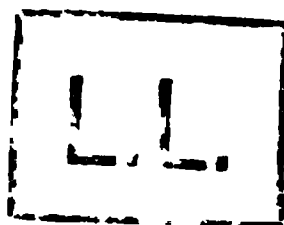
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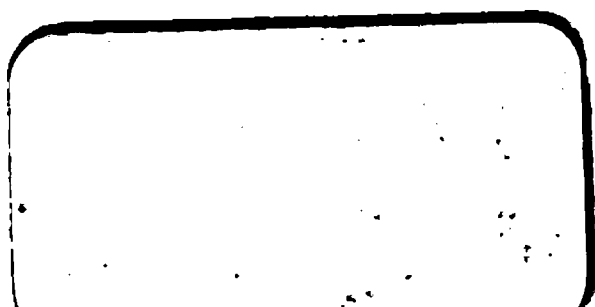
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REPORTS 499.

OF

CASES IN LAW AND EQUITY,

ARGUED AND DETERMINED IN THE

SUPREME COURT OF GEORGIA,

AT ATLANTA.

PART OF JANUARY TERM, 1873.

VOLUME XLVIII.

By HENRY JACKSON, REPORTER.

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Law School

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JUDGES AND OFFICERS

OF THE

SUPREME COURT OF GEORGIA,

DURING THE PERIOD OF THESE REPORTS.

HON. HIRAM WARNER, CHIEF JUSTICE.....*Greenville.*
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HON. R. P. TRIPPE, JUDGE*Forsyth.*

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Tallapoosa Circuit.....HON. WILLIAM F. WRIGHT.....*Newnan.*
 " " HON. HUGH BUCHANAN†.....*Newnan.*
Western Circuit.....HON. C. D. DAVIS.....*Monroe.*

*Judge PARROTT having died, Judge McCUTCHEN was appointed as his successor. He qualified on June 28th, 1872.

†The terms of office of Judges GREENE, COLE and ROBINSON having expired on January 1st, 1873, Judges HALL, HILL and BARTLETT were respectively commissioned as their successors. They qualified on January 27th, 1873.

‡Judge WRIGHT, on the resignation of Judge BIGBY, was appointed by Executive order as his successor. He held under this temporary appointment until Judge BUCHANAN was commissioned. The latter qualified on August 24th, 1872.

NOTE.

By Act of 1866, (section 4270 of the Code) the decisions of the Supreme Court are required to be "announced by a written synopsis of the points decided." The decisions thus announced from the bench by Judges McCAY and TRIPPE, are made the head-notes to the cases. The decisions announced by Chief Justice WARNER are published as his opinions, the head-notes being made by the Reporter. Head-notes by the Reporter are designated by (R.)

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CASES
ARGUED AND DETERMINED
IN THE
Supreme Court of Georgia,
AT ATLANTA,

JANUARY TERM, 1873.

PRESENT—HIRAM WARNER, CHIEF JUSTICE.
H. K. McCAY,
ROBERT P. TRIPPE, } JUDGES.

ATLANTA MINING AND ROLLING MILL COMPANY, plaintiff
in error, vs. ROBERT C. GWYER, defendant in error.

1. Where a party is solicited to make a loan, and to procure the means of so doing must spend time and incur trouble and expense in collecting the same from others, and does this at the request of the borrower, and upon his agreement to pay for such services and expenses, the transaction is not usurious. (R.)
2. Where an excess over the legal interest is paid for other good and valuable consideration beyond the mere use of money, it is not usury. (R.)

Debtor and creditor. Commissions. Usury. Before Judge HOPKINS. Fulton Superior Court. April Term, 1872.

For the facts of this case, see the decision.

POPE & BROWN, for plaintiff in error.

L. J. GLENN & SON, for defendant.

Atlanta Mining and Rolling Mill Company *vs.* Gwyer.

WARNER, Chief Justice.

1. The plaintiff brought his action against the defendant on an accepted draft for the sum of \$1,218 33, dated 12th January, 1867, payable one day after sight. On the trial of the case, the jury found a verdict for the plaintiff for the sum of \$889 54, principal, and \$242 50, for interest. A motion was made for a new trial, which was overruled, and the defendant excepted. The defendant claimed that the plaintiff had charged \$1,023 72 as commissions for the advance of money for it, in addition to the lawful rate of interest therefor, which, it is alleged, was usurious. It appears from the evidence in the record that, in May, 1866, the defendant borrowed of the plaintiff, in the city of New York, the sum of \$15,000 00, on three months time, at seven per cent. interest per annum, with the privilege of renewing upon the same terms, the defendant depositing with the plaintiff eight hundred shares of the capital stock of the Memphis and Charleston Railroad Company as collateral security. When the \$15,000 00 became due, after one or two renewals, and the plaintiff wanted his money, the defendant was not ready to pay it, but was anxious that the plaintiff should not sell the collaterals in his hands at that time to reimburse himself for the money loaned. There was quite an extensive correspondence between the parties in relation to this subject. On the 30th of November, 1866, the defendant wrote to the plaintiff: "We have no doubt you can negotiate a loan upon them (the collaterals) if you are obliged to have money, and save us from loss, and we will feel under additional favor, and, besides, we are willing to pay for the accommodation. You are at liberty to make for us the best arrangement you can for the extension." It appears from the evidence that the plaintiff did negotiate a loan for the defendant and did pay to the party negotiating such loan, by way of commissions, one per cent. per month, in addition to the seven per cent. per annum for interest, and the plaintiff charged the defendant the same commissions which he paid, and no more. The Court charged the jury

that if the plaintiff borrowed the money for his own use until he could get back what he had loaned defendant, and if plaintiff paid a certain sum for the use of the money so borrowed by him, he could not charge against the defendant the amount so paid for the loan to himself, unless the testimony shows that defendant had authorized him to so borrow the money and to so charge the defendant with the expenses of the same. We find no error in the charge of the Court in view of the facts of this case. It is quite clear, from the evidence in the record, that the defendant did authorize the plaintiff to negotiate a loan so as to enable him to carry the collateral securities for the benefit of defendant and prevent a sale thereof, at a sacrifice, and stated to him that defendant was willing to pay for the accommodation. Where a party is solicited to make a loan, and to procure the means of doing so must spend time and incur trouble and expense in collecting the same from others, and does this at the request of the borrower, and upon his agreement to pay for such services and expenses, the transaction is not usurious. Whether the payment upon a loan of more than the legal rate of interest is usury depends upon the particular facts of the case and the intention of the parties, and these are questions for the jury.

2. If paid or received for the loan or forbearance of the money, it is usury, but if the excess is for other good and valuable considerations, not interposed as a device to cover usury, the transaction is not usurious: *Thurston vs. Cornell*, 38 New York Reports, 281. This is a New York contract, made there, and, so far as it appears, was intended to have been executed there. We find no error in overruling the motion for a new trial.

Let the judgment of the Court below be affirmed.

Black vs. Scanlon.

GEORGE S. BLACK, plaintiff in error, vs. JOHN SCANLON,
defendant in error.

1. An affidavit made by the plaintiff in attachment that the debtor "is indebted to deponent to the best of deponent's belief in the sum of \$1,000 00, and that said resides without the limits of the State," is not "a substantial compliance in all matters of form" required by the attachment laws of this State, and is fatally defective.
2. A motion to dismiss an attachment founded on such an affidavit may be made whenever the case is called for trial.

Attachment. Practice. Before Judge HARVEY. Floyd
Superior Court. July Adjourned Term, 1872.

Black sued out an attachment against Scanlon, returnable to the July term, 1870, of Floyd Superior Court. The affidavit was as follows:

"GEORGIA—FLOYD COUNTY.

("Nine hundred and nineteenth District, Georgia Militia.)

"George S. Black comes before the undersigned, and on oath saith that John Scanlon is indebted to deponent, to the best of deponent's belief, in the sum of \$1,000 00. And that the said resides without the limits of this State.

(Signed) "GEORGE S. BLACK."

"Sworn to and subscribed before me,
this 31st day of December, 1869.

(Signed) "THOMAS J. PERRY, J. P."

At the July adjourned term, 1872, a motion was made to dismiss the attachment on the ground that the affidavit was defective. The motion was sustained and plaintiff excepted upon the following grounds, to-wit:

- 1st. Because the affidavit was sufficient.
- 2d. Because the motion came too late, even if the exception to the affidavit was good.

W. B. TERHUNE, represented by PRINTUP & FOUCHE, for
plaintiff in error.

ALEXANDER & WRIGHT, for defendant.

TRIPPE, Judge.

1. The affidavit upon which the attachment was issued was fatally defective. Section 3200 of the Code requires the party seeking the attachment to make an affidavit "that the debtor has placed himself in some one of the positions enumerated in this Code, and, also, of the amount of the debt claimed to be due."

In *Lockett vs. Usry*, 28 Georgia, 345, which was a proceeding to dispossess a tenant holding over, the defendant filed a counter-affidavit, stating that he was "not the tenant of said Usry, and does not hold the premises either by lease or rent from.....nor any other person holding under him by lease or rent." It was held that the defect by leaving the blank in the affidavit was fatal. This case is very similar to that. "An affidavit which is the foundation of a legal proceeding cannot be amended except expressly provided for by law:" Code, section, 3453. The reasoning in the case of *Lockett vs. Usry* applies to this.

2. If the affidavit be thus defective and not amendable, a motion to dismiss would be in order at any time. In this case the time between the issuing the attachment and the making the motion was not as great by a year or two as it was in the case of *Lockett vs. Usry* from the date of the warrant to the dismissal. If there be such a defect in a process as to make it void, time does not cure it.

Judgment affirmed.

JARED I. WHITAKER, for the use, etc., plaintiff in error, vs.
JOHN D. POPE, defendant in error.

1. Where an action was brought by A for the use of B, against C, and it appeared on the face of the declaration that the suit was brought for the use of B, and C acknowledged service and waived a copy of the declaration before the writ was filed:

Held, That the acknowledgment of services and waiver of copy so charges C with notice of the equitable rights of B, that he cannot after-

Whitaker vs. Pope.

- wards, before the writ is actually filed, buy up a debt against A and plead it as an offset, unless he, in some way, affirmatively make it appear that when he did so acknowledge service, he did not know the suit was for the use of B. A mere general statement that when he bought the offset he did not know of the transfer to B, is insufficient.
2. A set-off is a cross action ; a debt cannot be pleaded as a set-off, if there be at the time a suit pending against the plaintiff for the same debt in favor of one who was at the bringing of said suit the true owner of the said set-off.

Notice. Service. Set-off. Before Judge HOPKINS. Fulton Superior Court. April Term, 1872.

Whitaker, for the use of Emmett D. Dodge, brought complaint against Pope, on an account for \$6,962 25. The defendant pleaded several items of set-off, amongst others, a note dated April 30th, 1867, due January 1st, 1869, payable to James R. Brown, administrator upon the estate of John W. Lewis, deceased, or bearer, for the sum of \$2,000 00, signed by Jared I. Whitaker, as principal, and by John I. Whitaker and William Watkins, securities.

The evidence made the following case: Plaintiff established his account to the amount of \$2,245 41. Early one morning the defendant called upon plaintiff's attorney and acknowledged service upon the declaration in this case. He immediately thereafter purchased the above stated note from the payee, for the sum of \$500 00. To assure himself that he was in time to avail himself of said note as a set-off, he called at the clerk's office and found that the declaration had not then been filed. He had no knowledge, notice or information that the account had been transferred to Dodge. The declaration was filed on the day of, but after, the purchase.

The jury allowed the amount of the aforesaid note as a set-off, and found a verdict for the plaintiff for the balance. Whereupon the plaintiff moved for a new trial upon the following grounds, to-wit:

1st. Because the Court refused to charge the jury, "that if the defendant acquired a note for the very purpose of using it as a set-off in this action, and his purchase was after he

acknowledged service on the declaration, and on the same day the declaration was filed, he cannot use it as a set-off."

2d. Because the Court erred in charging the jury, "that if the note was purchased by the defendant before the time of the filing of the writ in this case, and at the time of his purchase he had no notice of an assignment to Dodge of the Whitaker debt, it could be set off against whatever the jury might find to be due to the plaintiff."

3d. Because the verdict was contrary to the law and the evidence.

The motion was overruled, and the plaintiff excepted.

L. E. BLECKLEY, by N. J. HAMMOND, for plaintiff in error.

No appearance for defendant.

McCAY, Judge.

We are not prepared to say that the acknowledgment of service and waiving copy was the commencement of suit. It may be that the plaintiff would never file it. The case of *Steadman*, not yet reported, does not meet this, since there the filing was waived, and the question was, whether it *must* be filed twenty days before Court, notwithstanding the waiver. But we are clear there ought to be a new trial.

1. The acknowledgment of service was notice to Pope that the equitable title to this debt was *claimed* to be in Dodge, and he could not buy an account against Whitaker after such notice. If he did, he took it with notice of whatever right Dodge might show. The Courts of law have, for a long time recognized the equitable transferee, and have protected him against any dealings by the defendant with the original owner after notice. True, Pope does say he bought without notice. But he admits he made this acknowledgment before he purchased. This, as we think, was notice of Dodge's *claim*, and that was all the notice he was entitled to. Unless he explain this acknowledgment—show that he did not know what the

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writ was, or in some way get clear of this evidence of notice, it is not sufficient that he says he had no notice of the transfer.

2. We think, too, the Court should have allowed the evidence of the pending suit in favor of Brown. Pope stood in Brown's shoes after the purchase, and if Brown could not set up this debt as an off-set in a suit—by even Whitaker against him—without some special motion or order of the Court, in the nature of a motion to consolidate and save costs, neither could Pope. A set-off is a cross-action. The plaintiff is not, by our law, required to plead in abatement, in reply to a plea of the defendant. And we see no reason why he may not reply to defendant's plea matter, which, if he were defendant, he could set up by such plea, to-wit: the pendency of a former suit.

Judgment reversed.

BIB SHARPE, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. It is not error for the Court, in a charge to the jury, to state hypothetical illustrations of a legal principle, unless it be done in such manner as would imply that they were intended to be used as facts which had been proven by the evidence.
2. In this case the jury were clearly authorized to believe that the defendant entered the house through a window, into a room where a girl of thirteen or fourteen years of age was sleeping, and got into her bed and under the cover, whilst she was asleep, and aroused her by touching her person, and that his purpose was to have sexual intercourse with her, and they having found, under a legal charge by the Court, that from his reckless and daring conduct, his intent was to use violence in the accomplishment of his purpose, this Court will not say the Court below erred in refusing a new trial on the ground that the verdict was contrary to law or the evidence.

Criminal law. Charge of Court. New trial. Before Judge HARVEY. Floyd Superior Court. July Term, 1872.

Bib Sharpe was placed on trial for the offense of an assault with intent to rape, alleged to have been committed upon the

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person of Georgia A. Watters, on March 26th, 1872. He pleaded not guilty.

The following evidence was introduced :

GEORGIA A. WATTERS, sworn: I felt something at my back; thought it was my aunt; asked who it was, but no answer was made. Put my hand on the head of the person. It was a negro's head, the hair being kinky. I screamed to my uncle that Bib Sharpe was in the room. He ran out before any one could come in. This occurred at night, in this county, during the month of last March. The moon was shining. There were three windows to the room. It was light enough to see the person. It was the defendant. Could tell him by his walk. Suppose he went out of the window; thought he went under the table, and so told my uncle. The motion at my back aroused me from sleep; it was about eleven o'clock at night. Prints of mud were under the clothing, from which I knew he had got under; there was a peculiarity about the defendant's walk by which I could recognize him; he walked with his shoulders stooped or shrugged; none of the windows were up when my uncle came in.

ANNE WATTERS, sworn: Georgia woke me by screaming that Bib Sharpe was in the room; I aroused Mr. Watters, and told him that some one was in the room where Georgia was; he replied that she was dreaming; she was in the habit of walking in her sleep. He went in and looked; she said that defendant was under the table; he could not find any one; and told her that she was dreaming, to lie down and go to sleep; I was in the habit of fastening the windows at night; took a light, went into the room and found the side windows buttoned down; the button on the end window was turned, the curtain drawn under one side of the sash and a flax sack under the other side, the sash being down on them; suppose this was done to prevent noise in dropping the sash; went back and told Mr. Watters that somebody had been in the room; he went out to defendant's room; this was about ten minutes after the alarm had been given; the window with the sack in it was the nearest to defendant's room; the moon was

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not shining on that window at all, but was shining brightly through the side windows; the bed was at the opposite end of the room from that window; the defendant had to pass through the moon-light which came in through the side windows; when I had finished my domestic matters on that evening, the defendant asked me if I wanted any pine brought in; I told him to have the pine in the kitchen, but subsequently he brought it into my room, and went out through Georgia's room; this was unusual conduct on his part; I fastened the windows before he brought in the pine, but did not examine them afterwards until the alarm; this occurred on Wednesday night, the 26th of last March. Upon examining the bed on the next morning, I discovered that the sheets were soiled with dry dirt; there were prints at the foot and head of the bed, as if soiled with dirty clothes.

WILLIAM WATTERS sworn: About ten minutes after the alarm I went to the defendant's room to see if he was there; he was in his room, covered up head and ears; the fire was burning unusually bright for that time of night; it appeared as if it had been lately stirred. The next morning I avoided giving him any grounds to suppose that I suspected him, and asked him where he had been on the preceding night? He replied, that he had been to Uncle Dan's, about a mile off, and returned about day-break. When I went into Georgia's room, after the alarm, she told me that there was a negro in the room, and that it was nobody else but Sharpe, and pointed where she said he was; I examined and found no one; said to her that she was dreaming; she insisted that she was not, that she had seen him and felt him. I had been to Rome on the day before, and had brought back the sack full of potatoes; it was emptied on that evening and the sack left lying on the table. On the next morning I examined the bed; the covering was pulled down from the foot-board, and round, dirty prints were on the sheets as though he had got on his knees on the bed; saw where he had slid out of the bed at the side; his clothes were usually very dirty. Georgia is in her thirteenth or fourteenth year. The door between my room

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and Georgia's was open. The defendant has a strange mind, and sometimes acts so as to make a person think he is a fool; my wife asked him once why he acted so, that he would make people think he was a fool? he replied, that he was not half as big a fool as people thought he was. There was a table right against the window, a little lower than the sill; he would have had to go over it in going out; it was upon this table that the sack was left. My little son, four years of age, was sleeping in the same bed with Georgia; he was in the part of the bed between her and the wall.

The jury found the defendant guilty. A motion was made for a new trial, upon the following grounds:

1st. Because the verdict is contrary to the evidence and the law.

2d. Because the verdict of the jury is contrary to the following charge of the Court: "Rape is a crime which involves the idea of force, and must be perpetrated forcibly and against the will. An assault with intent to rape cannot be committed without an open assault is proved. An assault is an attempt to commit a violent injury on the person of another, and in this case, to authorize the jury to convict there must have been an assault, a commencement of the perpetration of the crime."

3d. Because the Court erred in the following charge: "That the seizing by the arm, or an attempt to turn the young lady, or party over, would be an assault," there being no evidence to authorize such a charge.

The motion was overruled, and the defendant excepted upon each of the grounds aforesaid.

UNDERWOOD & ROWELL; FORSYTH & REESE, for plaintiff in error.

IVEY F. THOMPSON, Solicitor General, by HAMILTON YANCEY, for the State.

TRIPPE, Judge.

1. The Court, in the illustrations that were given to the jury, certainly intended them to be taken only as hypothetical instances explanatory of a legal principle, and not as reciting any facts as proven on the trial. We doubt not the jury so understood them, and could not have been misled by them. Had they been stated as being proven by the evidence, the question would have been different. But, under the strictest rule, some freedom must be allowed a Judge to explain and illustrate to a jury his meaning in a charge on legal questions, especially where such questions can thus be simplified and be made more fully comprehended by those who are to make an application of them to the facts of the case under investigation.

2. The main question in this case is, did the facts proven justify the verdict? The jury were authorized to find, and doubtless did so find, that a man—a negro man—in the night time, entered a room, by raising a window, where a girl thirteen or fourteen years of age was sleeping, and got into bed with her, under the bed clothes, and on his movements waking her, and she making an outcry, which was responded to from another room where her uncle slept, the negro fled out of the window. The jury found the defendant guilty. Shall their verdict be set aside? They have determined the facts and the intention; shall we say that intention was not as the jury found it? Here was an adventurer, guilty of a daring, reckless act, which, it is natural to suppose, no one would attempt, unless it was from a desperate purpose to accomplish the end intended at all hazards. The recklessness of what he did do illustrates the recklessness of his intention. A party acting as this defendant, has no right to complain where both the law and an outraged family spare his life. It is a principle found in many decisions, and in the elementary books, that a person may be guilty of this offense, though the intent afterwards subsides and he desists from his purpose, especially if he so desists from fright at being detected, or from inability to ac-

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comply his purpose: 35 Ala., 380; Bishop on Crim. Law, sec. 664, and note 4.

Judgment affirmed.

ROBERT J. MASSEY, trustee, plaintiff in error, vs. LUKE ALLEN, defendant in error.

1. Where the ground upon which a motion for a new trial was based, was that the defendant was absent from the Court on the day the case was called and tried, because somebody had told him that the presiding Judge had given public notice to all parties in cases that were litigated, that they need not attend Court on that day, it must be made affirmatively to appear from whom the defendant obtained such information, and that such public notice was in fact given. (R.)
2. Where, under the aforesaid facts, the defendant sought to set aside the verdict, the statement that it was "for largely more than was justly due," was entirely too indefinite. (R.)
8. The Court having to pass upon the weight and credit of the affidavits filed on the motion for a new trial, this Court will not interfere with its discretion unless abused. (R.)

New trial. Verdict. Discretion. Before Judge HOPKINS.
Fulton Superior Court. April Term, 1872.

For the facts of this case, see the decision.

POPE & BROWN, for plaintiff in error.

HILLYER & BROTHER, for defendant.

WARNER, Chief Justice.

1. This was a motion for a new trial in a case in which a verdict had been rendered in favor of the plaintiff against the defendant, on the ground that the defendant had been informed that the presiding Judge had given public notice to all parties in cases that were litigated, that they need not attend the Court on the day when the verdict was taken against him, and in consequence of such information the defendant was absent, and did not expect his case to be called while the Court was en-

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gaged in calling cases not litigated; that the plaintiff's counsel called the attention of the Court to this case, and stated it was not litigated; that defendant's counsel who had appeared for him in the case, had withdrawn from it; which latter statement was true, but that defendant was still relying on his defense when the case should be called for trial; that the then presiding Judge did not know that defendant had a plea filed, and therefore, permitted the plaintiff to take a verdict for largely more than was justly due. The foregoing facts were sworn to by the defendant. Judge Pope, who was the presiding Judge when the verdict was taken, after he went off the bench, was employed by the defendant, as his counsel, to set aside the verdict and obtain a new trial in the case. Judge Pope made an affidavit that the statements made in the defendant's motion for a new trial, as to the circumstances under which the verdict was taken, were, to the best of his recollection and belief, true. Henry Hillyer, one of plaintiff's counsel, made an affidavit that when the case was tried, it was reached in its order upon a regular call of the docket, and that the Court was not calling the docket for the purpose of trying or disposing of cases not litigated, but was calling the docket regularly for the trial of all cases where no legal grounds for continuance was shown. Upon this statement of facts, the Court refused to grant the motion for a new trial, whereupon the defendant excepted. The ground on which the motion for a new trial is based in this case, is that the defendant was absent from the Court on the day the case was called and tried, because somebody had informed him that the presiding Judge had given public notice to all parties, in cases that were litigated, that they need not attend the Court on that day. Who gave the defendant that information it does not appear, nor does it affirmatively appear that the presiding Judge gave any such public notice to parties litigating in the Court, as it is alleged, on the defendant's information. It is true, Judge Pope states in his affidavit, that the statements in the defendant's motion for a new trial, "as to the circumstances under which the verdict was taken," were true, to the best of his recollection and belief. The circum-

stances under which the verdict was taken may be true, and still the presiding Judge may not have given the public notice of which the defendant alleges somebody informed him. The having given the public notice to the parties by the presiding Judge, as alleged by the defendant, was an important fact, which the affidavit of Judge Pope omits to state.

2. Besides, the defendant states the verdict is for "largely more than was justly due," but for how much more, we do not know; the term "largely more" is rather too indefinite, when a party seeks to set aside a verdict because it is for too much.

3. But there is another view of this case which, in our judgment, must control it. The facts of the case were submitted to the Court for its judgment, on the evidence contained in the affidavits of the defendants, Pope and Hillyer. If the Court thought proper, in the exercise of its judgment, to give more weight and credit to the statement contained in the affidavit of Hillyer, when taken in connection with the proceedings had on the trial, apparent on the face of the record then before the Court, than to the statements contained in the other affidavits, it was its province to do so, and this Court cannot say that there was not sufficient evidence to support that judgment, and will not, therefore, interfere with it.

Let the judgment of the Court below be affirmed.

WILLIAM M. MOSES, plaintiff in error, vs. JAMES T. FLEWELLEN, defendant in error.

When money was raised by the sheriff under a *fi. fa.* in favor of A, against B, and C, the holder of an older *fi. fa.*, placed the same in the hands of the sheriff to claim the money, and gave him notice to hold the money for distribution by the Court, and the defendant instituted proceedings under the Relief Act of 1868, to reduce the older judgment, and pending these proceedings, though under the belief that they had been abandoned, the sheriff had paid the money over to the older *fi. fa.*, which had, in the meantime, been purchased by A, the holder of the

Moses vs. Flewellen.

younger *fi. fa.*, and the proceedings to reduce the other judgment were afterwards abandoned by the defendants:

Held, That it was error in the Court, on the motion of the defendant, to direct the money thus paid upon the older *fi. fa.* to be indorsed, as a credit upon the younger *fi. fa.*

Execution. Relief Act of 1868. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1872.

This case arose upon the following facts:

D. H. Baldwin & Company, for the use of D. H. Baldwin, recovered a judgment in the Superior Court of Muscogee county, on the 3d day of May, 1867, against James T. Flewellen, for \$18,233 93, principal, and \$1,788 08, interest, to the date of judgment, with the accruing interest, upon which an execution was issued. This execution was assigned to William M. Moses. It was levied upon certain property of defendant, which sold for \$7,000 00, \$4,700 88 of which amount was held up by the sheriff, under a notice from Edward Bradley that he claimed such sum as due to him on an execution in his favor, recovered against Abner H. Flewellen, as principal, and James T. Flewellen, as security, in the County Court of Muscogee county, on March 15th, 1867, and under an affidavit of Flewellen that he desired to suspend the payment of said last mentioned execution, under the Relief Act of 1868. On or about July 1st, 1869, whilst said fund was still in the hands of the sheriff, Moses purchased the Bradley execution at fifty cents on the dollar, and on August 27th, in the same year, the sheriff, under the impression that Flewellen's proceedings under the Relief Act of 1868, to open the judgment upon which said execution was based, had been abandoned, paid over said \$4,700 00 to said *fi. fa.*, and it was duly satisfied. But in fact, the proceedings to open said judgment had not then been abandoned, though they were based upon grounds held by the Supreme Court to be untenable. Proceedings were also instituted to open the junior judgment, which were subsequently and before the hearing of this motion abandoned.

Under these circumstances the defendant, Flewellen, moved the Court to direct the \$4,700 00, by which the Bradley exe-

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cution as aforesaid was satisfied, to be entered as a credit on the Baldwin execution. The Court so directed, and Moses excepted.

R. J. MOSES; M. H. BLANDFORD, for plaintiff in error.

INGRAM & CRAWFORD, for defendant.

McCAY, Judge.

When the whole record is considered, this case at last comes simply to this: The sheriff paid this money to Mr. Moses at a time when he ought not to have paid it. But as matters have finally resulted, had he kept the money until it was paid out under an order of the Court, the very *fi. fa.* on which it was in fact credited, would, under the law, have got it. It seems to us that it is pushing the idea of regularity and method very far to give such tremendous effect to this entry of credit.

As we understand the argument, it is this: "The money went into the sheriff's hands for distribution. It has never been legally and regularly distributed. In contemplation of law, it is therefore still in the sheriff's hands for distribution. If Mr. Moses has it, he has it as the bailee of the sheriff. Of the two *fi. fas.* claiming it, that of the oldest date is to be considered the oldest, but the entry of credit on it satisfies it, and, therefore, the younger *fi. fa.* takes the money." But this argument ignores the fact that this entry was for this very money, and if the money was not properly paid to it at the time, the entry does not represent the truth, and there is really no credit. The Judge of the Superior Court, on a rule for distribution of money, sits as a Chancellor, and the rules of estoppel, etc., do not operate unless they are just and equitable. Either the money was properly paid, or it was not. If properly, it is not now in the sheriff's hands. If improperly, the credit is nothing.

We think the order to enter the credit on the younger *fi. fa.* was error. The order ought to have been simply an order reciting the facts and directing that, though the payment had

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been made at a time when the sheriff was not authorized to pay out the money, yet, as the Bradley *fi. fa.* was the oldest, and as there had been a failure to reduce it, that the entry of it stand as a disposition of the fund held up by the notice.

Judgment reversed.

LEWIS TUMLIN, plaintiff in error, *vs.* THE VIRGINIA HOME INSURANCE COMPANY, defendant in error.

An award of arbitrators was, by order of the Court, entered on the minutes during the November term, 1871. At the same term, exceptions to the award were filed. No further action was taken at that term. At the ensuing April term, a demurrer to the exceptions was heard and sustained, and an order to that effect entered on the minutes. At the time of hearing the demurrer, leave was granted to defendant and time given to amend the exceptions. On the next day, the amendment was made and sworn to in open Court, though the amendment does not appear to have been then filed. On the 28th of June, the juries were discharged for the term, and the Court adjourned to the 26th of the ensuing August to hear motions, etc. On that day, the plaintiff moved for judgment on said award and for execution. Defendant objected, and the Court allowed the amended exceptions to be filed, and certifies to this Court that he "regarded the application for leave to amend as being in all the time, and why the order dismissing the exceptions was entered on the minutes, he did not remember."

Held, That as it does not appear that plaintiff made any further motion or asked for a trial in the case before the discharge of the juries, and had notice of the intention of defendant to file the amended exceptions, and leave granted therefor, and the Judge, who knew all the facts, holding that the time he had granted had not expired, it was not error in the Court to allow them to be then filed.

- Award. Exceptions. Amendment. Before Judge HOPKINS. Fulton Superior Court. April Term, 1872.

On November 3d, 1871, during the October term of the Superior Court of Fulton county, there was returned to Court and entered upon the minutes an award in favor of the plaintiff, in the case of Lewis Tumlin *vs.* The Virginia Home Insurance Company. On the succeeding day, the defendant filed

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exceptions. Thus the case stood until the 2d of May, 1872, during the April term of said Court, when the same came on for a hearing upon a demurrer to the exceptions. The demurrer was sustained, and an order to that effect was entered upon the minutes. On June 28th, 1872, the juries were discharged for the term, and the Court adjourned until the 26th day of the ensuing August, at which time business not requiring juries was to be transacted. On the 27th day of August, plaintiff moved for final judgment on the award and for execution. Defendant resisted the motion and asked leave to file amended exceptions. The Court refused to order final judgment, and plaintiff excepted.

To the bill of exceptions is attached the following note by the presiding Judge:

“When the demurrer to the exceptions was about to be or was disposed of, the counsel for defendant took time to amend his exceptions. Afterwards, I allowed the amended exceptions to be filed. I regarded the application for leave to amend as being in all the time. Why the order dismissing the exceptions was spread upon the minutes, I do not now remember.”

POPE & BROWN, for plaintiff in error.

PEEPLER & HOWELL, for defendant.

TRIPPE, Judge.

From the Judge's certificate, it is evident he did not intend or consider that the discharge of the juries should bar the defendant from the right to amend the objections, which he had granted, and which he considered as continuing “all the time.” It was nearly two months from the time the leave to amend was granted until the juries were discharged. The plaintiff made no motion all this time. The amendment was prepared and sworn to in open Court, the day leave was obtained, but it was not filed. Plaintiff had notice of the claim to amend, the order of the Court allowing the claim, but did not move until after the discharge of the juries.

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Under these circumstances, we do not think the Court erred in allowing the amended objections to be filed at the time the second motion was made. It might have been possibly more consistent with form for an order to have been taken, setting aside the order that was entered on the minutes. But the order allowing the amended objections to be filed virtually operated to supersede the former order, so far as it was necessary.

Judgment affirmed.

SARAH E. KENAN, plaintiff in error, vs. THOMAS JOHNSON, defendant in error.

1. Where the only allegation in a bill seeking to enjoin the defendant from prosecuting her claim for dower, in the lands of which her husband died seized and possessed, was that she, "after possessing and enjoying the assets of said estate to a large amount in excess of her lawful dower, and wasting the same by pleading and otherwise, had made application to the Superior Court to set apart her dower in said estate," which charge was expressly denied by the defendant's answer, it was error in the Chancellor to direct that the writ of injunction should issue. (R.)
2. The widow of the deceased testator had the legal right to her dower in one-third part of the land of which her husband died seized and possessed at the time of his death, unless that right was barred in the manner prescribed by the law. (R.)

Injunction. Dower. Before Judge BARTLETT. Baldwin county. At Chambers. April 4th, 1873.

For the facts of this case, see the decision.

WILLIAM MCKINLEY, for plaintiff in error.

CRAWFORD & WILLIAMSON, for defendant.

WARNER, Chief Justice.

1. This was a bill filed by the complainant against the defendants, as executor and executrix of A. H. Kenan, deceased, to marshal the assets of the estate of the testator, alleging the

same to be insolvent, and praying for an injunction; and that the defendant, Sarah E. Kenan, the widow and executrix of the decedent, be enjoined from prosecuting her claim for dower out of the land of which her deceased husband died seized and possessed, at the time of his death. The defendant, Sarah E. Kenan, answered the complainant's bill, and showed cause why the injunction should not be granted restraining her from prosecuting her claim for dower. The Court, on the hearing of the motion for the injunction, granted the same, and the widow excepted to that part of the order which restrained her from prosecuting her claim for her dower. The only allegation made in the complainant's bill, in bar of her right to dower, is that "said Sarah E. Kenan, widow, executrix and legatee as aforesaid, after possessing and enjoying the assets of said estate to a large amount in excess of her lawful dower, and wasting the same, by pleading and otherwise, hath made application to the Superior Court to set apart her dower in said estate." This allegation is expressly denied by the defendant, in her answer, which was not controverted at the hearing. But, independent of the defendant's answer, there is nothing alleged in the complainant's bill, (considering the will of the testator as a part thereof) which, under the law of this State, would have barred the widow of her legal right to dower in the land of her deceased husband: Code, 1754. Equity is ancillary not antagonistic to the law; hence, equity follows the law where the rule of law is applicable, and the analogy of the law where no rule is directly applicable: Code, section 3028.

2. The widow of the deceased testator had the legal right to her dower in one-third part of the land of which her husband died seized and possessed, at the time of his death, unless that right was barred in the manner prescribed by the law. There being nothing alleged in the complainant's bill which, under the law, would bar her of her dower, the Court below erred in restraining her, by injunction, from prosecuting her legal right to have it assigned to her.

Let the judgment of the Court below be reversed.

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**ROBERT FARROW, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.**

1. The verdict was not contrary to evidence, the case being, under the evidence, one where manslaughter was a very proper verdict.
2. Whatever may be the law, in a proper case, as to how far a man must retreat to avoid an assault not a felony, there was nothing to show that defendant had retreated at all, and for this reason, neither the refusal to charge, as asked, nor the charge as given, was such error, if error at all, as to justify a new trial. He was not entitled to the charge as asked for, and the charge as given did him no harm, but rather good service; it presented a hypothesis in his favor, based on his retreat, of which there was no evidence.
3. The introduction of the prisoner's statement is not such an introducing of testimony as deprives the prisoner of the conclusion, if he introduces no testimony, but we are of the opinion that the statement of the Judge, to the effect that, if it was introduced, he would, when the time for the argument came, hold the prisoner not entitled to the conclusion, was not, under the statute, a decision so as to authorize a bill of exceptions.
4. The allegation that the person killed was Robert Germany, a person of color, was sustained by proof that Robert Germany was the name of the deceased, the words person of color being unnecessary and surplusage.
5. The newly discovered evidence was not shown to be, in fact, in existence, by the affidavit of the witness by whom it could be proved, or any excuse given for its non-production.

Criminal law. Indictment. New trial. Practice. Evidence. Bill of exceptions. Newly discovered evidence. Before Judge WRIGHT. Troup Superior Court. November term, 1871.

Robert Farrow was placed upon trial for the offense of murder, alleged to have been committed upon the person of Reuben Germany, a person of color. The defendant pleaded not guilty.

The evidence made the following case: On a Tuesday night, during the latter portion of the month of October, 1871, Wily Cunningham and the deceased were out hunting. Columbus Cunningham, the brother of Wily, and defendant met them in the road. Columbus became involved in a difficulty

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with deceased; Wily led the deceased off from his brother, when deceased jerked away, struck Wily, jumped back, drew his knife, rushed at Wily and closed with him; Columbus then seized deceased, when defendant took Columbus off of deceased's back, and threw him on one side of the road. Defendant said to deceased, "God damn you, you have cut me." Deceased shut up his knife and said, "If I did, I did not aim to do it." Defendant replied, "God damn you, you have cut me," pulled out his knife, rushed upon deceased, struck him in the breast and said, "God damn you, I will shoot you." He did not shoot, but struck deceased three times in the breast: When he stuck him the third time, deceased closed with him and ran him back, bending him over the fence; the defendant then commenced cutting deceased; deceased threw defendant out into the road, got up off of him, and said that defendant had cut him all to pieces; Wily told him to come and go home; he said he was not able to go, and asked Wily to come and unbutton his pants; deceased laid down and said, "God bless the man, I love him for all he has served me so." He died in fifteen or twenty minutes; deceased had been drinking. One witness testified that some three weeks before the homicide, defendant said to him that deceased had made him mad; witness asked what about? Defendant answered that he heard deceased tell a lady to slight him, defendant, for him, deceased, and that the first time he crossed his path, he intended to put a ball in him. The defendant was somewhat stouter than deceased.

There were some few discrepancies in the immaterial portions of the testimony, but the case as herein stated, is all that is necessary to a clear understanding of the decision of the Court.

When the evidence was closed, the defendant proceeded to make his statement to the jury, as allowed by statute in such case made and provided. Counsel for the State objected to its reception, save as such testimony, as, if received, would debar counsel for defendant from opening and concluding the argument to the jury, which objection was sustained; it was

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further ruled by the Court that if defendant should make his statement, then his counsel would be precluded the privilege of opening and concluding the argument to the jury.

To which ruling counsel for defendant excepted. Defendant requested the Court, in writing, to charge the jury "that if Reuben Germany, the deceased, was described in the indictment as a person of color, it was such an allegation as must be strictly proven as alleged, and that no presumption that such was the fact could, outside of the evidence, be entertained by the jury," which charge the Court refused to give, and defendant excepted.

Defendant, in writing, requested the Court to charge, "that if the jury believed that during a sudden rencounter with the deceased, the defendant fled as far as he consistently could, by reason of a fence and other impediments, and then, under a reasonable fear of great bodily harm, slew his assailant, that it was justifiable homicide," which charge the Court refused to give, but on the contrary, charged the jury, "that under any circumstances of retreat or avoidance, if the defendant was under the fear of a reasonable man that a felony was about to be perpetrated upon him by his assailant, then the killing would be justifiable homicide, but that any circumstances of retreat or avoidance under reasonable fear of any less bodily hurt, could only reduce the offense to voluntary manslaughter," to which charge defendant, by his counsel, excepted.

The jury returned a verdict in these words: "We, the jury, find the defendant guilty of voluntary manslaughter." Whereupon counsel for defendant moved for a new trial in the said cause, upon the following grounds, to-wit:

1st. Because the Court erred in ruling that the statement of the prisoner at the bar is such testimony as to preclude counsel for defendant from making the concluding argument, when such defendant introduces no other evidence or testimony.

2d. Because the verdict was contrary to the evidence and principles of justice.

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3d.' Because the verdict was strongly and decidedly against the weight of the evidence.

4th. Because, since the trial of the said cause and the verdict rendered, new and material evidence has been discovered by the defendant, to-wit: that of Columbus Cunningham, of said county, who informed this defendant that he heard Reuben Germany, the deceased, just before the fatal rencounter, curse and threaten the defendant, using toward said defendant, Robert Farrow, words and threats going to show an intention to take said defendant's life.

In support of the last ground was attached the affidavit of the defendant.

The motion was overruled, and counsel for defendant excepted upon each of the grounds aforesaid.

COX & TURNER, for plaintiff in error.

1. (a.) See Irw. Rev. Code, 4551, 3798; Stat. 1868, p. 24. When old statute is repealed by new: 1 Black. Com., 89; Irvin *et al. vs.* Moore *et al.*, 15 Ga. R., 361; Elrod *vs.* Gilliland, H. & Co., 27 Ga. R., 467. General rule as to construction of statutes: 1 Bl. Com., 61; Irw. Rev. Code, section 4. As to technical terms: 1 Bl. Com., 59. Definition of testimony: Bouv. Law Dic., vol. 2, 4th ed., 589; see State *vs.* Williams, 3 Ga. R., 460; 18 Johns., 218.

(b.) See 3 Green. Ev., 22; Wharton's Amer. Crim. Law, vol. 1, 597.

(c.) See 4 Bl. Com., 185; Park. Cr. R., vol. 1, 164; Cons. of Ga., Art. XI., sec. 3; Code of Ga., 4268.

(d.) See definition of crime: Irw. Rev. Code, 4227, 4228.

(e.) All the acts of prisoner, up to the time he struck deceased, clearly show that his intention was to quell difficulty.

2. A state of mind once proven to exist is presumed to continue until rebutted by proof: Irw. Rev. Code, 3701.

3. Prisoner drawing knife and striking deceased in breast is not such proof, because the act may be accounted for upon a reasonable hypothesis, consistent with his innocence, to which construction he is entitled: 3 Green. on Ev., 29.

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4. The facts are: Deceased was drunk; deceased had attempted to cut all present; deceased stabbed prisoner whilst he, prisoner, was in the act of defending himself; all present had persuaded deceased to stop the fuss.

5. *First hypothesis*: Prisoner seeing all appeals to the reason of deceased fail, attempted, by threats, to overawe him, and thereby prevent further acts of violence on his part.

6. This hypothesis is reasonable. Prisoner did not intend to execute his threats, for there is no evidence that he had a pistol; prisoner did not intend to cut deceased, because he did not open his knife; prisoner did not intend to inflict upon deceased the least bodily hurt, for, having ample opportunity, he did not strike him as though he were fighting, and prisoner retreated when he was assaulted.

7. *Second hypothesis*: Prisoner made the threat to protect himself from personal danger, which he had a right to do: Whar. Amer. Crim. Law, sec. 1026.

8. Prisoner had a right to deem the threat necessary, because all other means to stop deceased's violent assaults had failed: See evidence, generally, of Wm. Jackson and Wiley Cunningham.

9. Prisoner could not run, because he was badly wounded in the knee; (was before the jury on crutches;) prisoner had reason to fear another stab, because deceased had cut at every one in his reach, and did not see deceased put up his knife, because it was dark.

10. The killing was justifiable, under common law doctrine of chance-medley: 4 Bl. Com., 184.

11. Prisoner, when assaulted, retreated as far as he could; he retreated because, being the stronger man of the two, deceased could not have forced him back against his will.

12. In self-defense, under section 4264 of Irwin's Revised Code.

13. The facts are: Deceased had stabbed him once; deceased's every act showed a reckless inconsideration of human life; deceased's assault upon prisoner was violent and contin-

uous; deceased threw prisoner in such a position as deprived him of all means of defense, except the one used.

14. See Irwin's Revised Code, 3665. As to importance of this evidence, see *Monroe vs. The State*, 5 Ga. R., 86, head note, 3; see, also, opinion of Lumpkin, Judge, in *Monroe vs. The State*, 5 Ga. R., 136, 138.

MABRY, TOOLE & SON, for the State.

McCAY, Judge.

1. Without doubt, this was an unfortunate affair—an instance of the sad evil of intemperance and of the consequences of allowing one's passions to get the control of the respect for human life and of human and divine law. That the prisoner had cause for anger is unquestionable, and the circumstances do, in our judgment, excuse him from the guilt of murder, yet he has taken a human life without any of the justifications allowed by law. At the time he inflicted the fatal blow, he had no reason to fear any harm to himself from the deceased. From all the facts, one cannot but think that even the cuts he got in the struggle between the deceased and the person with whom he was quarreling, were accidental. At any rate, the evidence is conclusive, that as soon as the deceased knew he had injured the prisoner, he expressed his regret, and put up his knife. The prisoner had no reason to suppose the deceased intended to interfere with him any longer. In this state of things, impelled by his own fierce passions, he draws his knife, rushes upon the deceased and strikes him several times on the breast with his open knife in his hand. The clinching of him by deceased was only the natural act of a man, doing the best he could against a violent assault, and there was nothing in this to justify the killing. The hot passion, induced by his wounds, is the only excuse that in our judgment exists, and the jury has given him the benefit of this by the verdict of manslaughter. We cannot say, from the evidence, that this verdict is illegal; there is some evidence even, that the fatal wound was in the breast, and that this

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was inflicted before deceased clinched the prisoner, and if the jury believed this he gets off pretty well by a verdict of manslaughter.

It is not necessary for us to decide the question so elaborately argued, as to how far one must retreat to be justified in killing one who is manifestly endeavoring by violence or surprise to commit upon him a wrong less than a felony. The prisoner, in this case, did not retreat at all; there is absolutely no evidence, from which it is possible to infer, that he retreated at all. In the immediate struggle, which ended in the death of deceased, the prisoner was the aggressor, and the evidence shows no act of his indicating any disposition to get away. The charge asked for was not, therefore, pertinent to the evidence. And the charge as given, whether right or not, did the prisoner no harm, as it presented a hypothesis in his favor which the evidence did not justify.

2. The deceased is described by his *name* and by his color. The name is sufficient. It is laid down by Chitty, that if the occupation be stated it is surplusage, and need not be proven: 1 Chitty's Criminal Law, 211. And this is a general rule as to matters of description. The case in 16 Arkansas Reports, of the killing of the Wyandotte Indian, was right enough, as that was all the description given. It would be too burdensome to require every particular of description to be proven. It is enough if a sufficiency is proven to identify. The name does that; the color is only another mode of identification. All colors of men stand now on equal footing before the law.

3. It is only in a very loose sense that the prisoner's statement is evidence. Ordinarily it can have only the force which its consistency, naturalness and inherent probability gives it. It is a very poor privilege if it has to be bartered for the conclusion, and we do not think it was the intent of the Legislature to make its introduction have that effect. It was so easy and so natural to say so, that the absence of a provision is an argument against it. Criminal laws are to be construed favorably to the accused, and no right is to be construed away. It must be clear that the law takes it away. We do not, therefore,

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agree with the Circuit Judge in the opinion he expressed. But we do not think this a ground for a new trial. The facts stated do not constitute a decision. He did not rule out the statement, nor did he refuse the right to conclude. All that can be said is, that he announced that under certain circumstances he would deny the right to conclude. He did not in this case deny it, because the party, in anticipation of what the Judge *would decide*, took such a course as to obviate the anticipated decision. It would be dangerous to treat such an announcement as a decision. A Judge's known opinions are no reason why parties should not call upon him to decide. His decision in one case is no justification for a party who has a similar case, not to demand a new decision. The true course was to put in the statement, and when the time came for the argument, to evoke the decision of the Court.

4. The rule is well established that to get a new trial, on the ground of newly discovered testimony, the affidavit of the witness must be produced. Something more at any rate must appear than the affidavit of the party making the motion. Ordinarily, and perhaps universally, there must be the affidavit of the witness, or of some one who *knows* what the witness *can* and will testify to.

Judgment affirmed.

JOHN TATE, plaintiff in error, vs. THE STATE OF GEORGIA,
defendant in error.

The City Court of Atlanta has no power, under the Act organizing said Court, to grant new trials, nor can that power be derived from that provision in the Constitution allowing writs of error from the judgment of City Courts.

New trial. Before Judge COWART. City Court of Atlanta. March Term, 1866.

John Tate was found guilty of bastardy in the City Court of Atlanta. A motion for new trial was made upon several

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grounds, unnecessary here to be set forth. The motion was overruled, and the defendant excepted. When his case was called in the Supreme Court, counsel for the State moved to dismiss the writ of error, upon the ground that the City Court of Atlanta had no authority to entertain a motion for a new trial. The Court took the question under consideration, heard the case upon its merits, and decided as is set forth in the preceding head-note.

THRASHER & THRASHER, for plaintiff in error.

JOHN T. GLENN, Solicitor General; HOWARD VAN EPPS, for the State.

TRIPPE, Judge.

There is no power conferred by the Constitution on any Court to grant new trials, except on the Superior Courts. The Act organizing the City Court of Atlanta makes no provision as to new trials being granted by the Judge thereof. Wherever that power can be exercised, it is derived from some express grant. The old Inferior Courts did not have the power, and the different City Courts which have the right, get it by special provision, either in the Acts organizing such Courts or some subsequent enactment. The power is now given to the Judges of the County Courts, but it is by the Act of February 24th, 1873. It is true, that by the Constitution, there may be a writ of error from the City Courts to this Court; and the want of power in such a Court to hear a motion for a new trial may deprive a party, on a writ of error, of the right of being heard on the question of the verdict being against the evidence. But this is a matter for the Legislature. There is the writ of *certiorari* which might avail in such a case, and also the writs of *mandamus* and *prohibition*, through which other rights may be asserted and wrongs prevented.

I will remark, upon the point made in the argument, that the evidence did not show the child was begotten and born

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within the limits of the city of Atlanta, that the prosecutrix states those facts positively in her testimony. For a further decision made in connection with this case, see *John Tate vs. R. J. Cowart*, Judge, application for *mandamus*, decided at this term.

Judgment affirmed.

JAMES M. ELLIOTT, plaintiff in error, vs. THOMAS J. COX
et al., defendants in error.

Delivery of produce to a common-carrier consigned to factors under a contract before that time made, is such a delivery to the latter as will cause their lien to attach for advances made. (R.)

Factors. Lien. Advances. Delivery. Before Judge HARVEY. Floyd Superior Court. January Adjourned Term, 1872.

For the facts of this case, see the decision.

UNDERWOOD & ROWELL, for plaintiff in error.

ALEXANDER & WRIGHT, for defendants.

WARNER, Chief Justice.

This case came before the Court and was decided on an agreed statement of facts. On the 11th day of April, 1870, at Rome, Georgia, T. J. Cox, and E. O. Cox, his wife, executed and delivered the following instrument: "On or before the 1st day of November next, we, or either of us, promise to pay to the order of Griffith, Clayton & Company, at their office in Rome, Georgia, \$502 50, for five tons of soluble guano, and one ton of Dixon's Compound, with interest from date, and we promise and agree to deliver to them, for storage and sale, our cotton crop made on our plantation in Alabama, this year, as soon as it is made ready for market, value received." It

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was admitted that the cotton was made on the defendant's plantation in Alabama, and shipped by them on steamboat, consigned to Griffith, Clayton & Company, on the 4th of January, 1871, that the cotton arrived in Rome the day after it was shipped, and on its arrival there, was levied on by an attachment sued out by the plaintiffs, as the property of Cox. The plaintiff's demand was admitted to be correct, and was founded on the following instrument:

“ROME, GEORGIA, August 25th, 1869.

“Received of J. M. Elliott & Company \$300 00, advanced on my present crop of cotton, which I promise to ship to them for sale, on my default, rate of interest one and one-fourth per cent. per month. (Signed) T. J. Cox.”

The cotton was claimed by Griffith, Clayton & Company, and the question was, whether it was subject to the plaintiff's attachment, or whether the claimants, as factors in possession, had a lien on the cotton for their advances made to Cox, under the before recited instrument. The Court decided that they were in possession of the cotton, and were entitled to claim their lien thereon for their advances made to Cox and wife, as specified in the contract. Whereupon, the plaintiffs excepted. The questions made in this case were substantially decided in *Wade & Company vs. Hamilton et al.*, 30 *Georgia Reports*, 450. It is true, that the words in the agreement in that case, were that the factors were to “reimburse” themselves out of the proceeds of the cotton promised to be forwarded to them by Hamilton, which words are not in the written contract in this case, but, in our judgment, taking into consideration the relative position of the parties at the time the contract was made, as well as the character of the advances made by the factors, that it was intended by them that the cotton should be delivered to Griffith, Clayton & Company, as the factors of Cox and wife, for storage and sale, in order that they might reimburse themselves out of the proceeds of the sale thereof, for the advances which they had made to them, and such we think is a fair interpretation of the contract. The case of *Wade &*

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Company vs. Hamilton decides that the delivery of the cotton to the carrier, consigned to Griffith, Clayton & Company, was a delivery to them, and, therefore, they were in possession of the cotton as factors of Cox. The plaintiff's claim was for advances made on the crop of 1869, and not on the crop of 1870. It is advisable in all cases where factors make advances to planters on the faith of their crops being sent to them for storage and sale, to reimburse themselves out of the proceeds thereof, that the terms of their contract should be definite and explicit. We confine our judgment in this case, in the interpretation of this contract to the relation of factor and planter, for advances made on the faith of the crop of the latter.

Let the judgment of the Court below be affirmed.

JOHN L. SCREVEN, receiver, plaintiff in error, vs. WILLIAM L. CLARK, defendant in error.

A receiver appointed by a Chancellor to "collect" the effects belonging to a corporation, a defendant in a suit pending in chancery, has no authority to bring a suit in order to get possession of the effects, unless he be specially authorized so to do by the order of the Chancellor, and if he bring such suit and fail to show the order, he cannot recover.

Equity. Receiver. Before Judge JOHNSON. Muscogee Superior Court. October Term, 1872.

John L. Screven, as receiver of the Brunswick and Albany Railroad, brought trover against William L. Clark, for eight box, railroad freight-cars, of the value of \$15,000 00. The defendant pleaded the general issue. Upon the trial, the only evidence introduced of the authority of the plaintiff to institute said suit, was the following order:

Screven vs. Clark.

“RUFUS B. BULLOCK, Governor, who sues for the interest of the State of Georgia *et al.*, vs. JACOB DART *et al.*

“*Bill, etc., in Glynn Superior Court.*

“AT CHAMBERS, Blackshear, Ga., Oct. 30th, 1871.

“It appearing to the Court that since the filing of complainant's bill in the foregoing cause, John L. Screven, the receiver appointed by the Governor of Georgia, has accepted said trust:

“It is ordered that said John L. Screven be, and he is hereby appointed, temporary receiver of the Brunswick and Albany Railroad Company, and of all its property of every kind. And he is hereby ordered to collect immediately all said property together, and hold the same subject to the further order of the Court. Granted by me, at Chambers, this 30th day of November, 1871.

(Signed) “WILLIAM M. SESSIONS, J. S. C., B. C.”

When the evidence was closed, the Court charged the jury that the order aforesaid did not authorize the receiver to institute a suit; to which charge the plaintiff excepted.

The jury returned a verdict for the defendant. Whereupon the plaintiff assigns the charge aforesaid as error.

MOSES & DOWNING, for plaintiff in error.

INGRAM & CRAWFORD, for defendant.

McCAY, Judge.

The rule is perhaps an arbitrary one, but it is, nevertheless, well settled that a receiver has no right to sue without express authority from the Chancellor; his general authority to collect and keep the assets is not sufficient to justify him in bringing an action: Daniel's Chancery Practice, 1988, *et seq.* A receiver is at last only an officer of the Court, and the foundation of the rule, probably is, that it is always for the Court itself to determine whether it shall be dragged into litigation. At law, the party having the legal right to sue is

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the proper party, and if one comes suing for the property of another, he must show, as part of his right to recover, the authority he has to come into a Court of law, asserting another's right. We think this failure to show any authority to sue is fatal to the case of the plaintiff below, and do not go into the other question argued; though we think the evidence of a right of property in the company is strong, and that the order in favor of the Dawson Manufacturing Company does not affect the *title*. Their claim on the fund by the terms of the order did not cease until they got the cars.

Judgment affirmed.

JANE CARTER AND AMANDA MERIWETHER, plaintiffs in error, vs. THE STATE OF GEORGIA, defendant in error.

If the evidence contained in the record does not show where the offense was committed, of which a defendant is found guilty, and there be an assignment of error that the verdict was contrary to law, a new trial will be granted.

Criminal law. Venue. Before Judge HOPKINS. Fulton Superior Court. April Term, 1873.

Plaintiffs in error were placed on trial for the offense of keeping a lewd house. The jury returned a verdict of guilty. A motion for a new trial was made upon the ground, amongst others, that the verdict was contrary to law. The brief of evidence fails to disclose where the offense was committed. The motion was overruled and plaintiffs in error excepted.

THRASHER & THRASHER, for plaintiffs in error.

JOHN T. GLENN, Solicitor General, for the State.

TRIPPE, Judge.

The evidence in the record does not show that any offense was committed in the county of Fulton. The witness

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said the house was on the corner of Broad and Walton streets, without further defining the locality. It was necessary to prove in what county these streets are. Courts do not judicially take cognizance of such facts. It is proper to remark, that the Solicitor General stated that the omission to insert the county in the brief of the evidence was an oversight and not observed until the case was here. This is very probably true, but the record is all that can speak on that point. By it this Court and parties are bound.

Judgment reversed.

JOHN DOE, *ex dem.* SAMUEL MOBLEY, plaintiff in error, vs. RICHARD ROE, *casual ejector*, and A. D. BREED, lessee of the Selma, Rome and Dalton Railroad, tenant in possession, defendant in error.

1. Where a railroad company claims title to land, as having been condemned under the provisions of its charter, the burden of proof is upon the company to show a strict compliance with its terms. (R.)
2. Upon the trial of the issue as to whether land was legally condemned under the provisions of the charter of a railroad company, it was error to allow a witness to testify that "the assessment was made in accordance with the provisions of the charter, and all the notices required to be served, were either served or waived by the parties," although the original papers may have been lost or destroyed. (R.)
3. The sworn copy of original proceedings, produced by a witness in Court, is better evidence than his oral declarations. (R.)
4. Where the owner of land, through which a proposed railroad will run, contracts to accept payment for his land in the stock of said company, upon the consolidation of said company with another, said land owner is not compelled to accept the stock of said new company. (R.)
5. It is error for the Court to charge upon a point not in evidence. (R.)

Charter. Constitutional law. Eminent domain. Contract. Evidence. Charge of Court. Before Judge HARVEY. Floyd Superior Court. July Term, 1872.

For the facts of this case, see the decision.

UNDERWOOD & ROWELL; WRIGHT & FEATHERSTON, for plaintiff in error.

PRINTUP & FOUCHE, for defendants.

WARNER, Chief Justice.

This was an action of ejectment brought by the plaintiff against the defendant, to recover possession of a certain strip of land on which the defendant has located its railroad. On the trial, the plaintiff proved title in himself to the premises in dispute and possession by the defendant. The defendant pleaded that the land had been condemned for the use of the company under the provisions of its charter, and set forth in his plea a copy of the proceedings alleged to have been had for that purpose. After hearing the evidence and the charge of the Court, the jury found a verdict for the defendant. A motion was made for a new trial on the several grounds stated therein, which was overruled, and the plaintiff excepted. By the sixth section of the charter of the Georgia and Alabama Railroad Company, it is provided that in all cases in which any difficulty may arise between individuals and the company as to the right of way, or damages to the land on which said road may be located, either party may apply to the sheriff of the county in which the land is located, who shall summon a jury of five *freeholders* who shall enter upon the land, and after taking the oath prescribed, award in writing the damages, if any, to be paid by the company, and upon the payment of the damages so assessed, the fee simple title to the land shall vest in the company. Some ten or twelve years after this charter was granted, this company was consolidated into the Selma, Rome and Dalton Railroad Company. On the trial, D. S. Printup was offered as a witness for defendant, who stated that he was attorney and agent of the company at the time the assessment of damages to plaintiff's land was made, and was present attending to the same; that the papers were returned by him to the secretary and treasurer of the company

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and have been lost or destroyed. Produced copies of the papers which he stated were about the same as those in the defendant's plea, and gave them to sheriff Watters to serve, doubtless meaning the original papers. The alleged copy of the original papers, which the witness produced, were not offered and read in evidence to the jury, so far as the record shows. The witness then testified that he offered the plaintiff a certificate of stock in the Selma, Rome and Dalton Railroad, which he declined to take; what was the amount of it does not appear. No offer was ever made to the plaintiff of stock in the Georgia and Alabama Railroad Company, nor was there at any time any certificate of stock issued by that company. The witness also stated that the plaintiff was present when the assessment was made. The assessment was made in accordance with the provisions of the charter, and all the notices required to be served were either served or waived by the parties. This latter part of the witness' statement was objected to, and the objection overruled and that is assigned as error. Watters, a witness for defendant, stated he was sheriff or deputy sheriff at the time of the assessment, served copies of the papers handed him by Colonel Printup, on the plaintiff, but does not remember doing any specific act or acts, nor what papers were served, but remembers that he did what was required of him in his official capacity; plaintiff was present at the time of the assessment and made no objection. After the jury had agreed on a verdict, plaintiff asked him what it was; told him it was \$500 00, he then said he was to take it in stock of the company. There are other witnesses who testified that the plaintiff was present when the assessment was made, and that he was to take the assessment in stock.

1. Was the evidence of Printup, which was objected to, admissible for the purpose of showing that the plaintiff's title to his land had been lawfully condemned for the use of the company, under the provisions of their charter? In my judgment, it was not. The land owner stands upon all his legal rights, and when the company seeks to invade them, under

the authority of its charter, the burden of proof is upon them to show that they have strictly complied with its terms.

2. The original papers relating to the assessment of the plaintiff's damages, were lost. The next best evidence would have been the sworn copy thereof which Printup had in Court, and if he could have stated, from his knowledge of the contents of the original proceedings, that the paper which he produced in Court was a substantial copy thereof, and it had appeared therefrom that the requirements of the charter had been complied with, for the condemnation of the plaintiff's land to the use of the company, it would have defeated the plaintiff's right to recover. What I intend to say is, that if the sworn copy paper, produced in Court by the witness, showed on the face thereof that the provisions of the charter had been complied with in assessing the damages for the taking the plaintiff's land by the company, and the damages so assessed had been shown *to have been paid*, it would have defeated the plaintiff's right to recover.

3. The sworn copy of the original proceedings produced by the witness in Court was better evidence than his oral declarations. Besides, his oral declarations that the assessment of the damages was made in accordance with the provisions of the charter, was a conclusion of law, the witness should have stated the facts that transpired when the assessment of damages was made, so that the Court and jury could have decided whether it was made in accordance with the provisions of the charter. The condemnation of the plaintiff's land for the use of the company, under their charter, depended on the facts connected with the proceedings had for that purpose, and not on the *opinion* of the witness. It was the province of the Court and jury to decide, from the facts proved, whether the plaintiff's land had been lawfully condemned for the use of the company, under the provisions of their charter, and not the province of the witness to decide that question; and, in my judgment, it was error in allowing him to do so over the plaintiff's objection. The plea of the defendant was not evidence on the trial; besides, it does not appear on the face of

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the paper set forth in the plea that the jurors, summoned by the sheriff to assess the damages, were freeholders, or that they took the oath prescribed before any officer authorized to administer it; nor did the evidence on the trial prove either of these facts. If the original papers, containing the proceedings under which the defendant claims that the plaintiff's land was condemned for the use of the company, had been before the Court at the trial, all the requirements of the charter must have appeared on the face thereof to have been complied with, in order to divest the plaintiff of his title to his land, and the loss of the papers does not dispense with the proof of the necessary facts to accomplish that result by the best evidence in the power of the defendant to produce.

4. It appears from the evidence in the record, that the plaintiff was an original subscriber of \$500 00 of stock in the Georgia and Alabama Railroad Company, and had paid two installments thereon. The jury assessed the plaintiff's damages for the right of way through his land, according to the evidence, at \$500 00, to be paid in the stock of the company. Whether the plaintiff agreed that the jury might return their verdict that he should be paid for his land in stock, or whether he agreed that he would take the amount of the verdict in stock, is not so clear, but no stock in that company has ever been paid or offered to be paid him, in discharge of that verdict. There is no evidence in the record that the plaintiff has ever been paid one dollar for his land, either in the stock of the Georgia and Alabama Railroad Company or in anything else. The defendant offered him a certificate of stock in the Selma, Rome and Dalton Railroad Company, which he declined to receive, and there is no pretense that the plaintiff ever agreed to receive the stock of that company in payment for his land. The Court charged the jury, amongst other things, to the effect that if the plaintiff was a stockholder in the Georgia and Alabama Railroad Company he would be chargeable with notice of the consolidation of that company with the company of defendant, and his consent thereto might be presumed, and, if by his acquiescence in the building of the road

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on his land by the defendant, he cannot now, by his action of ejectment, recover the land and turn out the defendant, provided the new as well as the old company had always held themselves ready to deliver him a regular certificate of stock to which he was or is entitled, on account of the assessment made as before stated. There is no evidence in the record that either the old or the new company had always been ready to deliver to the plaintiff a regular certificate of stock in payment for his land. The only evidence in relation to that point in the case is, that Printup offered the plaintiff a certificate of stock in the Selma, Rome and Dalton Railroad Company, which he declined to take; the time the offer was made or the amount of the certificate, is not stated. The fact that the plaintiff was a stockholder in the Georgia and Alabama Railroad Company, although he might have consented to its consolidation into the new company, did not bind him to accept the stock of the new company in payment for his land; he never agreed to take the stock of that company for his land, and no other stock was ever paid or offered to be paid him therefor, so far as the evidence in the record shows.

5. The charge of the Court, in view of the facts of the case, was error. The defendant completed its road on the defendant's land in November, 1868.

In view of the facts as disclosed by the record in this case, we reverse the judgment of the Court below, and order a new trial, unless the defendant shall pay to the plaintiff the sum of \$500 00, with interest thereon from the first day of November, 1868, and in the event the defendant shall do so, then the judgment of the Court below to stand affirmed, and the land of the plaintiff, taken for the use of the defendant's company, shall vest in the defendant, as provided by its charter.

Let the judgment of this Court be so entered.

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McCauley vs. Hargroves.

HENRY McCAULEY, plaintiff in error, vs. THOMAS HARGROVES, for use, etc., defendant in error.

(TRIPPE, Judge, was providentially prevented from presiding in this case.)

1. The judgment of a District Court of the United States, having jurisdiction of the parties and the subject matter of the judgment, is conclusive between the parties in a State Court, upon the merits of the matter adjudged, but the jurisdiction of the Court is always open to inquiry.
2. Where there is nothing in the action of the Court to show that the defendant was notified, and the judgment upon its face shows that the defendant did not appear, and the return of the marshal is without any formal venue, and does not state where the defendant was served, it is competent for the defendant in a suit on the judgment in a State Court, to show that the service was effected out of the territorial jurisdiction of the marshal, and when he had no authority to effect service.

Judgment. Jurisdiction. *Res adjudicata*. Service. Before Judge JOHNSON. Muscogee Superior Court. October Term, 1872.

Thomas Hargroves, for the use of George Cromelin, brought complaint against Henry McCauley for \$1,051 81, besides interest, alleged to be due on a judgment obtained by the plaintiff against the defendant, at a District Court of the United States for the Middle District of Alabama, in the city of Montgomery, on the 30th day of May, 1867. The defendant pleaded *nul tiel* record, and that no service had been perfected upon him in the cause upon which the judgment was rendered.

The plaintiff introduced in evidence the exemplification of the record of the cause in the United States Court, upon which appeared the following entry of service:

“Executed by serving a copy of the within summons and complaint on the defendant, Henry McCauley, this the 1st day of May, 1867. (Signed)

“R. W. HEALEY, U. S. Marshal.”

It further appeared that judgment was rendered on May 30th, 1867, the defendant having made default.

The plaintiff closed.

The defendant tendered himself as a witness to show that he had never been served with any process in said case in the United States Court, except at the city of Columbus, in the State of Georgia; that he had never been served in the State of Alabama. Upon exception made, the Court excluded the testimony, and defendant excepted.

The jury returned a verdict for the plaintiff for \$1,011 81, with interest from November 4th, 1867.

The defendant assigns the aforesaid exclusion of testimony as error.

HENRY L. BENNING, for plaintiff in error.

The judgment of the district Court of the United States is void, because the Court had no jurisdiction over McCauley, the defendant in the judgment.

"But no person shall be arrested in one district for trial in another, in any civil action before a Circuit or District Court:" Act of Congress, 1789; Brightly's Digest, 231, and note (g.) "A marshal shall be appointed in and for each district, whose duty it shall be to execute throughout the district all lawful precepts directed to him and issued under the authority of the United States:" Brightly's Digest, 595.

Under these provisions, the United States Courts have decided that the Circuit and District Courts cannot, either in suits at common law or in equity, send their process into another district: *Ex parte*, Graham; 3 W. C. C., 456; Wilson vs. Graham, 4 *Ibid.*, 53; *ex parte*, Graham, *Ibid.*, 211, (referred to in Brightly's Digest, 231, note (g);) Herndon vs. Ridgeway, 17 Howard, 424; Buchanan vs. Jones, 12 Ga., 612; Boswell vs. Otis, 9 Howard, 336; Irwin's Revised Code, section 3264; Dasher vs. Virgil & Dasher, July, 1872, by this Court.

The deputy marshal's return on the process is: "Executed by serving copy of the within summons and complaint, on the defendant, Henry McCauley." Where, it does not say; the

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defendant did not appear, and judgment was taken against him by default; *ergo extrinsic* evidence was admissible to show where; as it would have explained, but not have contradicted the record. But if it would have contradicted the record, still it was admissible, for *extrinsic* evidence is admissible to show a want of jurisdiction: *William vs. Berry*, 8 How., 498, 540.

"The judgment of a Court having no jurisdiction of the person and subject matter, or void for any other cause, is a mere nullity, and may be so held in any Court when it becomes material to the interest of the parties:" *Irwin's Revised Code*, section 3536.

"A judgment that is void may be attacked in any Court and by any body. In all other cases judgments cannot be impeached collaterally, but must be set aside by the Court rendering them:" *Ibid.*, section 3776; *Boyd vs. Glass*, 34 Ga., 256; *Sharman vs. Morton*, 31 Ga., 45; *Johnson et ux., vs. Wright et al.*, 27 Ga., 560; *Griffith vs. Wright*, 18 Ga., 174, 175; *Mobley et al. vs. Mobley*, 9 Ga., 249, 250; *Parker vs. Jennings*, 26 Ga., 141; *Shumway vs. Stillman*, 6 Wend., 447; *Fenton vs. Garlick*, 8 Johns., 194; *Watson vs. New England Bank*, 4 Metc., 343; 4 *Ibid.*, 333; *Biggers vs. Hutchings et al.*, 2 Stew., 445-6.

R. J. MOSES, for defendant.

McCAY, Judge.

1. The general doctrine has long been well settled that the judgments of Courts of other States of this Union are, under the Constitution and laws of the United States, to have the same credit and faith in other States as they have in the State where they were rendered: *Mills vs. Durzee*, 7 Cranch, 481; *Hampton vs. McConnel*, 3 Wheat., 334; *Evans vs. Tatum*, 9 Ser. and R., 252, 260. But, as was said by Wayne, Judge, (in *McElmayle vs. Cohen*, 13 Peters, 312, 320,) this is not intended to exclude such defenses to the judgment as inquire into the *jurisdiction* of the Court in which the judgment was given, or such as inquire into the right of the State itself to

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exercise authority over the *persons* or subject matter. And, again, "the Constitution did not mean to confer a new power of jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the State." In *Hall vs. Williams*, 6 Pick., 222, the action was in Massachusetts, on a Georgia judgment. The record showed that the defendants had *appeared*, but the Court held that the defendant might show that this was not true, that the attorney who did appear had authority to appear from only one of the parties sued. And, during the course of the decision, Chief Justice Parsons says: "By the Constitution, such a judgment is to have the same force and effect it would have in the State where it was rendered—that is, it is to conclude as to everything over which the Court rendering it had jurisdiction. If the citizen himself is there, and is served with process, he is bound to appear and make defense, or submit to the consequences. But if never there, there is *no jurisdiction* over his person, and a judgment cannot follow him beyond the territory of the State. If it does, he may treat it as a nullity, and the Courts here will treat it so, whenever it is made to appear, in a legal way, that he was never a proper subject of the adjudication." And this is unquestionably now the settled rule, to-wit: that, whilst the judgments of other States are to be considered as conclusively settling the subject of dispute as to the merits, yet the jurisdiction of the Court over the parties or subject matter is always the subject of inquiry: 1 New Hampshire Rep., 348; 7 New Hampshire Rep., 257; 11 New Hampshire Rep., 299; 2 Gilman, 412; 3 Alabama, 552; 4 Cowan, 2921; 6 Wend., 447; 7 Watts & S., 447; 15 John., 141.

2. The only question upon which there is now any conflict is, as to how far the recitals of the judgment as to the service or appearance of the defendant are conclusive, so as to operate as an estoppel in another jurisdiction upon the defendant. On this question the authorities are in conflict. In the case of *Hall vs. Williams*, before quoted, 6 Pick., 222, the defendant was permitted to show that he did not appear, although the

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record stated to the contrary. In *Starbuck vs. Murray*, 5 Wendell, 148, Judge Marcy takes the broad ground, that, on the question of jurisdiction, the recitals of the judgment or statements of the record are only *prima facie*, and he says: "If the defendant had not proper notice of, and did not appear to the original action, all the State Courts, with one exception, agree in opinion that the paper introduced as to him, is no record, but if he cannot show, even against the pretended record, that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense by a process of reasoning that is, to my mind, little less than sophistry. The plaintiff, in effect, says: 'The paper produced is as against you a record, because it says you appeared, and you are estopped from saying you did not appear, because the paper is a record. The appearance makes the paper a record, and the fact that the paper is a record, makes the statements of appearance unimpeachable.'" And again, "unless a Court has jurisdiction over a party, it cannot make a record importing verity against him, and he ought not, therefore, to be estopped from setting up any fact that goes to show the Court giving the judgment had no jurisdiction." Such, too, was the ruling in 6 Barbour, 613, and in *Steel vs. Smith*, 7 W. & S., 447. In the latter case, which was a suit on a Louisiana judgment, sued upon in Pennsylvania, the record showed service on the parties, and the defendant offered to show that this was not true, in fact, but was recited because of a law of Louisiana, which made service on one of several joint owners, service on all. And Judge Gibson, after going over the whole subject, says: "It was not intended by the Constitution to efface the lines of jurisdiction for the origination of process, but only to give extra-territorial effect to judgments of tribunals having jurisdiction of the persons or property, in the first instance, and we must, consequently, treat all others as nullities." The same view is taken in *Wilson vs. The Bank of Mount Pleasant*, 6 Leigh., 570.

Without doubt, there are decisions to the contrary of these: 1 Peter's Circuit Court Reports, 155; 1 Ohio, 359; 2 McLean,

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511, and other cases. But it seems to us that the reasonings of Marcy and Gibson, are founded on just principles, and lay down the true rule. In the case at bar, the record proper contains no recital. There appears to have been, in fact, no appearance, as the judgment is by default; and I have not found a case where the mere fact that the record shows an *entry* by the *executive officer* of the Court, of service, has been held an estoppel. The furthest any of the cases go is where the record states that the defendant appeared, or that he had been served. The idea of the cases is that, by such recitals, it appears that the Court had inquired into the facts and decided upon them. We doubt if the effect of a judgment is, (in the case of a judgment of another jurisdiction,) to be given to the entries of the sheriff or marshal. This entry has no venue. The defendant does not propose to deny the fact of the entry, but to show that it was made out of the territorial jurisdiction of the officer. If such an entry as this cannot be denied—if it cannot be shown, as is here proposed, that the officer making it came over, say from Alabama to Georgia, served a copy of a writ on a resident of Georgia and made his return, all rules of jurisdiction might as well be abandoned.

We think the facts set forth in the plea, if proven, will show the Alabama Court to have had no jurisdiction of the person of the defendant, and we think he is not estopped from showing the truth, because the marshal of the United States Court in Alabama has seen fit to certify that he had duly served the defendant with process.

Judgment reversed.

WILLIAM R. PHILLIPS *et al.*; plaintiffs in error, vs. DAWSON
A. WALKER, defendant in error.

1. One creditor holding a common law judgment, where the debtor is involved or unable to pay all his debts, cannot enjoin another creditor in a common law judgment older than the first, on the ground that the latter has received from the debtor a sufficient amount of usury to dis-

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charge his existing judgment, and, from that fact, ask a decree, either that such judgment be declared satisfied, or postponed until the senior judgment is paid.

2. Where it is claimed by the junior judgment creditor of a debtor, who is unable to pay his debts, that the holder of the oldest judgment purchased another judgment younger than either of the others, for about one-fifth the amount, under an agreement that the debtor was to have the benefit of the surplus, and, by agreement between the creditors, they released their judgment liens on a certain portion of the debtor's property, which the debtor was to sell and pay a large portion of the proceeds to the creditor who held the oldest execution, and it was so sold and nearly all the portion paid to said creditor, applied to the payment of the whole of the judgement so purchased by him, and on the hearing of an injunction to restrain such creditor from selling the balance of the debtor's property, under the oldest *fi. fa.*, and claiming the whole of the proceeds under it, and asking that the money so appropriated shall be credited to the oldest execution, the evidence being conflicting, and the Chancellor grants the injunction, this Court will not interfere with his discretion in so doing.

Equity. Injunction. Usury. Judgments. Before Judge HOPKINS. Fulton County. At Chambers. February 1st, 1873.

Dawson A. Walker filed his bill against William R. Phillips and Edward White, making, substantially, the following case :

White borrowed from Phillips, at different times, \$2,090 00, for the use of which he agreed to pay him five per cent. per month. Subsequent to the original loans, which were embraced in two notes, together with a small portion of the usury, all beyond principal and legal interest was deducted therefrom, and White gave his mortgage on the place whereon he resided to secure the payment of the balance, Phillips retaining in his possession and control, judgments on six \$100 00 notes, and on one \$50 00 note, all of which were given purely for usury on the above loans. Phillips sued the two large notes to judgment, foreclosed the mortgage, and levied upon White's property. To stay the sale, the latter gave to Phillips, purely as usury, notes amounting to \$715 31. White has paid in money as usury at five per cent. per month, and

as usury on the usury at the rate of 10 per cent, \$1,186 03. Phillips then sold to Thomas Alexander and in order to complete his speculations upon his debt in the negotiations of sale, levied upon the property of said White, and procured various other judgments junior to his, and that such sale was an advantage to him, and he received therefrom \$2,111 00. He then consented to a release of said property by one execution, held by William Bradford & Rennick, he could not satisfy the attorney for the plaintiff was not satisfied of this execution \$1,587 80, including for the benefit of White, amounting to \$1,587 80, including Phillips purchased this lien from White. The sale to Alexander of the proceeds of which Phillips said, and in consideration of the from the liens which he had full satisfaction of the Executioning that he had purchased the satisfaction in part of the on the \$100 00 usury on the notes, to secure which was unsatisfied in whole or in part been levied upon one of the property of said White is insolvent. Compensation \$1,525 00, and a judgment which the forty-five per cent under the aforesaid interest due to Phillips.

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the sheriff the amount of Phillips' executions, which have, in fact, been paid off. The land, at public sale, will not bring more than \$1,500 00. Complainant waives discovery, and prays that Phillips be enjoined from selling said one hundred and two acres of land under the aforesaid levy; that said execution, the mortgage execution, and all other evidences of indebtedness on the part of White to Phillips, be decreed to be canceled; that Phillips be enjoined from further proceeding on any of said evidences of indebtedness, or from transferring the same; that the writ of subpoena may issue.

The answer of Phillips denies most emphatically that he purchased the Bradford & Rennick execution for the benefit of White, but on the contrary, alleges that he purchased it for his own benefit and advantage. Denies the right of complainant to set up usury for White, and especially after it had been reduced to judgment. Admits the correctness of the amounts of the loans, etc., and the rate of usury set forth in the bill.

Upon the hearing of the motion for injunction, conflicting affidavits were read as to the manner in which the Bradford & Rennick execution was purchased.

The Chancellor directed that the writ of injunction should issue, upon complainant's entering into bond and security in the sum of \$2,000 00, conditioned to pay defendant, Phillips, such damages as he may sustain by reason of the wrongful suing out of the writ. To which ruling the defendant excepted.

COLLIER, MYNATT & COLLIER, for plaintiffs in error.

A. W. HAMMOND & SON, for defendant.

TRIPPE, Judge.

1. We are not disposed to carry the doctrine, in the case of *Pope vs. Solomons*, 36 Georgia, 541, to the extent asked for by the complainant in this case. We by no means impeach that decision. But we do not think that a common law judg-

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ment can be enjoined either by the defendant in that judgment or by another creditor of that defendant, because there has been usury paid by him to the judgment creditor, and a decree demanded that a credit be entered on the judgment to the amount of such usury; that, we take it, is the first point made in the bill. Most of the usury paid by White to Phillips was paid on judgments. Suits were instituted on Phillips' various notes on White. No defense was made, judgments regularly obtained, and many of them paid by White. Phillips now has a judgment at law, and also a mortgage judgment for the same debt against White. The complainant in the bill, a creditor of White, seeks to enjoin Phillips from collecting his common law *fi. fa.* and to have it credited with the usury heretofore paid by White to Phillips. There is a limit to the right to go behind a judgment, and where the defendant does not avail himself of the personal privilege to set up the question of usury, permits judgment to go against him, and there is no fraudulent combination between that creditor and debtor against other creditors, we think the judgment closes the question. We speak now with reference to ordinary judgments, and do not mean to say what construction is to be given to the provisions of the Code as to mortgages. That question does not arise in this case, for Phillips has both a common law and mortgage *fi. fa.* In *Pope vs. Solomon*, both creditors were simple contract creditors, and the debtor had absconded. The money they were contending for was in the hands of a trustee, and Pope had a right to avail himself of all the rights of the absent debtor, and there being no claim or right of Solomon fixed by judgment, the law could properly determine the equities between Pope and Solomon as to that fund.

2. But the next point made in the bill of complainant is free from this difficulty. It is that, by an agreement between the creditors of White, certain property of his was permitted to be sold; that a large part of the proceeds were to go into the hands of Phillips to be by him applied to his debts; that this part was so received by Phillips, but appropriated mostly

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to one *fi. fa.*—the Bradford and Rennick *fi. fa.*—when but about one-fourth of the amount so applied should have gone to this *fi. fa.* The complainant asks that this should be corrected, and Phillips' older *fi. fa.* be credited with this difference. The evidence on the hearing before the Chancellor on this point was conflicting, but the injunction was granted. It is very evident what disadvantage the creditors would labor under if this, the last property of their debtor, is forced to sale, and whilst they are disabled from running it up to a good price from the certainty of having all the money to advance, and of its being paid over to Phillips, or to go into litigation over the distribution to be made of it. Under the facts of the case the interest of all parties would be subserved by having it decided beforehand whether it was to be sold under an execution that would take nothing, or one-fourth of the whole. The inducement to the other creditors to press the bidding might be altogether controlled by that fact. And if the charges made by complainant be sustained they have the right to ask to be relieved from this disability, and to be placed back on a fair footing at the sale. We cannot say the Chancellor abused his discretion in granting the injunction on this point.

Judgment affirmed.

W. S. BROWN, plaintiff in error, vs. W. H. PERSONS, defendant in error.

Where a party enters upon land under a contract of purchase, the relation of landlord and tenant does not exist, and the vendee, upon failure to pay the purchase money according to his contract, cannot be dispossessed as a tenant at sufferance. (R.)

Landlord and tenant. Vendor and purchaser. Before Judge WRIGHT. Fayette Superior Court. October Term, 1872.

For the facts of this case, see the decision. .

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M. M. TIDWELL; I. C. GRICE; W. A. TIGNOR; Z. D. HARRISON, for plaintiff in error.

J. L. BLALOCK, by A. W. HAMMOND & SON; PEEPLES & HOWELL, for defendant.

WARNER, Chief Justice.

The plaintiff in the Court below sued out a warrant to dispossess the defendant from a tract of land in the county of Fayette, under the 4005th section of the Code, as a tenant at sufferance. The defendant filed his counter-affidavit denying that he held the possession of the land, either by lease or rent or at will, or by sufferance or otherwise, from the plaintiff. On the trial of the issue before the jury, it appears from the evidence in the record, that the plaintiff sold the land to the defendant for the sum of \$1,200 00, the defendant paying therefor at the time of the purchase the sum of \$300 00 in cash, and giving his two promissory notes to the plaintiff for the balance of the purchase money, one due 25th December, 1868, the other due 25th December, 1869. The plaintiff executed his bond to the defendant, conditioned to make him a title to the land if the notes specified therein should be paid when the same became due. The defendant went into the possession of the land under this contract of purchase, and has made improvements thereon to the value of \$170 00. The notes were not paid at maturity. The Court charged the jury, "that where one party gave his bond to another for title to lands conditioned to make title to said land when the purchase money should be paid, and that upon failure to pay the purchase money by the obligee when the money became due, he became a tenant at sufferance, and liable to be removed by the obligor by summary process, and also liable to the obligor for double rents from the time of demand or notice." Under this charge of the Court the jury found a verdict for the plaintiff. The defendant made a motion for a new trial on the ground of error in the charge of the Court, and also, upon other grounds specified in the record, which was overruled,

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and the defendant excepted. The charge of the Court to the jury was error, in view of the facts of the case disclosed by the record. The 2253d section of the Code defines the relation of landlord and tenant in this State. Where the owner of lands grants to another *simply the right to possess and enjoy the use of such lands*, either for a fixed time, or at the will of the grantor, and the tenant accepts the grant, the relation of landlord and tenant exists between them. In such cases, the tenant has only a usufruct which he cannot convey except by the landlord's consent, and which is not subject to levy and sale. The defendant was not in the possession of the land in question, under a grant from the plaintiff simply to possess and enjoy the use of the land for any fixed period of time, or at the will of the plaintiff as his tenant, but was in possession of the land as a purchaser thereof from the plaintiff, under a contract made between them for the sale of the land, and the land so purchased by the defendant and held by him under a bond for title, a part of the purchase money having been paid, was subject to levy and sale in satisfaction of judgments obtained against him as his property: Code, 3424. Besides, the plaintiff could have sued the defendant on the notes when due, for the unpaid purchase money, obtained judgment thereon, filed a deed in the clerk's office, and sold the land as the property of the defendant, as provided by the 3604th section of the Code. This land held by the defendant, under his bond for title, might have been attached as his property: Code, 3225. The defendant might also have sold the land as his property, and transferred his bond for title to the purchaser. In *Barnes vs. Shinholster*, 14 *Georgia Reports*, 131, it was held that when a party enters upon land under a contract for the purchase of it, such a contract destroys the relation of landlord and tenant, and is entirely inconsistent with it.

In view of the laws of this State defining the relation of landlord and tenant, there was no pretence for holding that the defendant, under the facts disclosed by the record in this case, was a tenant at sufferance of the plaintiff, and liable to

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be turned out of the possession of the land, as such, by the summary process provided for by the 4005th section of the Code.

Let the judgment of the Court below be reversed.

SWIFT, MURPHY & COMPANY, plaintiffs in error, vs. MARY F. McLEMORE, defendant in error.

1. In this case, which was a bill of exceptions to the judgment of Judge Johnson, refusing to sustain a *certiorari* in a possessory warrant case, it appeared that the warrant was for three bales of cotton; that the cotton was made on the plantation of Mrs. McLemore, the plaintiff, by one Joiner and herself, who had farmed together in the making thereof; that Joiner had, during the summer, given to the plaintiff a lien upon all his interest, for advances, etc., with a power to sell; that, later in the year, he had, in writing, sold and transferred to her his whole interest in the crop; that, whilst the cotton was on the farm, it was levied on as the property of Joiner and carried to a warehouse; that Mrs. McLemore put in a claim to it; that, on the trial of the claim, the property was found to be hers; that, two days after the finding, Joiner, by consent of one of the claimant's attorneys, took the cotton from the warehouse and sold it to the plaintiff in the claim case, and delivered it to him, and that he, the said plaintiff, is now the owner, the present defendants being only his bailees.

In our judgment, the cotton was legally in Mrs. McLemore's possession at the time of the levy; that, after the trial of the claim case, the custody of the warehouseman was her custody; that there is no proof of the authority of the attorney of Mrs. McLemore, two days after the trial and verdict, to consent for Joiner to take the cotton, and we, therefore, affirm the judgment refusing to order a new trial before the magistrate, or to restore the cotton to the defendants in the possessory warrant.

Possessory warrant. *Certiorari*. Attorney and client. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1872.

Swift, Murphy & Company filed their petition for *certiorari* to the decision of Thomas J. Shivers, a Notary Public and *ex officio* Justice of the Peace, upon the trial of a possessory warrant for three bales of cotton, in favor of Mary F. McLe-

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more, against petitioners. The application was sanctioned and the writ issued. The answer of the Justice showed that, upon the trial of the case, it was proved by F. M. Reese, that plaintiff and one John H. Joiner farmed together in Lee county, Alabama, during the year 1870, and were jointly interested in the crops. That Joiner, being indebted to plaintiff for money loaned, to secure the same, executed to the plaintiff a deed of trust or mortgage, with power of sale, which embraced all his interest in the crops of cotton, corn, etc., dated February 10th, 1870, and recorded on July 7th, 1870. That Jinks & Shannon, a firm of merchants at Loachapoka, Alabama, attached five bales of cotton as the property of Joiner, on the premises cultivated by said Joiner and the plaintiff. That a claim was filed by the plaintiff and a trial had before a Notary Public and a jury at Loachapoka, Alabama, which tribunal decided in favor of the claimant. That Joiner, on December 22d, 1870, sold and conveyed to the plaintiff his entire interest in the crop, except three bales of cotton, one of which was to go to Andrew Dawson, and two to J. C. Phillips. That the Alabama Notary Public ordered the officer having the cotton in charge, after it had been awarded to the plaintiff by the verdict of a jury, to deliver the same to Joiner, who claimed it as exempt, under the laws of Alabama. The warehouseman refused to deliver up the cotton, on the ground that it had been awarded, by the verdict of a jury, to the plaintiff, and he had been instructed by witness not to deliver said cotton unless so ordered by the plaintiff's attorneys. That Joiner then saw Mr. Willis, one of the plaintiff's attorneys, who went with him and instructed said warehouseman to deliver said five bales of cotton to Joiner, upon his paying all charges. That Joiner paid the charges, took possession of the cotton and sold the same to Hollifield & Jinks. That this last transaction, to-wit: the delivery of said five bales of cotton to Joiner, was proved to have occurred on the Monday subsequent to the verdict of the jury and the order of the Court that said cotton should be delivered to the plaintiff. That Hollifield & Jinks

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shipped three bales of the cotton to the defendants, and two bales to Montgomery, Alabama. That Jinks, of Hollifield & Jinks, is the same person as Jinks, of Jinks & Shannon. That he was present at the trial of the claim case, knew its result, and plaintiff's right to the cotton at the time Hollifield & Jinks purchased from Joiner.

The Court affirmed the judgment of the Justice, and the defendants excepted, and now assign said ruling as error.

PEABODY & BRANNON, for plaintiffs in error.

JAMES M. RUSSELL, for defendant.

McCAY, Judge.

The propriety of the judgment in this case turns almost wholly on the evidence. It is not very clear, from the evidence, in whose possession this cotton was at the date of the levy. It was, however, at the farm of the plaintiff when seized under the possessory warrant. It was made by herself, and the defendant in the *fi. fa.*, on her plantation. *Prima facie*, we should say the possession was hers; she being the owner of the land. When the claim case was determined in her favor the possession of the warehouseman, where the officer had it stored, was hers. The only question left was whether her possession was legally changed. That depends on the authority of the attorney and the magistrate to interfere with it; clearly it would seem the order of the magistrate, in the teeth of the verdict and some days after, was void. Nor does the mere facts that Mr. Willis, who *had been* the plaintiff's attorney on the previous trial, gave him authority to dispose of the cotton some days after the trial.

We do not think, therefore, the judgment of the magistrate in this case was one requiring the Judge of the Superior Court to interfere by *certiorari*. One might, perhaps, differ with the magistrate as to the weight of the proof, but that does not authorize, certainly does not require, a *certiorari*.

Judgment affirmed.

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ISHAM B. ONEIL, plaintiff in error, vs **THE STATE OF GEORGIA**, defendant in error.

1. Where a defendant, on trial for murder, objects to evidence showing that he killed James Little, on the ground that the indictment charges him with the murder of James Lutle, and the presiding Judge, on inspection, held the name to be James Little, and all the testimony proved that to be the name of the party slain, this Court will not, by an examination of the original indictment, overrule the judgment of the Court below. The testimony in case of conviction is made a part of the record in the case, and had the defendant been acquitted, and afterwards been again put on trial for the murder of James Little, the introduction of the whole record would have sustained the plea of *autrefois acquit*.
 2. Under the same rule, this Court will not overrule the judgment of the Court below refusing to arrest the judgment on a motion founded on the same ground, to-wit: "That the name of the deceased in the indictment was Lutle, and the evidence was, that the person killed was named Little."
 8. Defendant's counsel requested the Court to charge the jury, "that if they entertained doubts as to the law, the prisoner is just as much entitled to the benefit of those doubts as if they applied to the facts; that if they entertain a reasonable doubt as to whether the evidence is applicable to the law as given them in charge, then the prisoner is entitled to the benefit of that doubt, and it would be their duty to acquit." And the Court does not charge the written request, but does charge that the jury are "exclusive judges of the testimony. You take the law from the Court, the testimony from the witnesses, see what it is, and apply one to the other. You judge of them, and they enable you to arrive at the truth," and also further charged, "the mind of a juror must be convinced so that no reasonable doubt remains of defendant's guilt; that is to say, after you have impartially, carefully and solemnly examined and weighed all the testimony in the case, if your mind is still unsettled, wavering, not at rest, it would be your duty to acquit the defendant, for that is the doubt of the law:"
- Held*, That the defendant was not entitled to the first clause of the written request, and though the second clause may correctly state the law on the point contained in it, still a new trial will not be granted, because it was not given in charge just as it was written, when the charge that was given gave the defendant all the benefit he could have claimed under the principle involved in that portion of the written request, which was legal.
4. Where the Court charged the jury "that if there is a theory on which the case can be placed, and all of the witnesses speak the truth, that is the true theory, and it is your duty to adopt it. If there is a basis

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on which you can put the case, and all the witnesses speak the truth, it is your duty to adopt that as true," and immediately adds, "but if this cannot be done, and the testimony cannot be so reconciled, then look to the witnesses. See what is true and what false. You are exclusive judges of this, and in passing upon it you judge it not in detached portions, but determine the truth or falsehood of each fact by the light of all the testimony in the case. Take each witness as he appears, and is presented to you by this record—by this testimony—as he appeared to you on the stand, and as his statements appeared before you, and from other witnesses in the case, determine who is to be believed, what portion is to be believed and what rejected :"

Held, That this charge was not error; and it placed no illegal limitation on the right of the jury to disbelieve any testimony or any witness, which, under the law and the evidence, they had the privilege to reject as unworthy of credit.

5. Where the charge was given on Saturday evening, it was not error for the Court to say to the jury, "if you should make up your verdict at any time before twelve o'clock to-night, let the sheriff notify me, and I will come to the Court-house to receive it." And the more especially was that not error when the Court added, "but let not the hour control or influence your decision or deliberations. Let not that consideration shorten or lighten your deliberations one single instant. Examine the case carefully."

6. In view of the whole case, we cannot say that the verdict is not sustained by the evidence, and the law as to manslaughter having been fully and fairly given in charge, this Court will not interfere with the judgment of the Court below refusing a new trial.

Criminal law. Murder. Indictment. Misnomer. *Autrefois acquit*. Charge of Court. Reasonable doubts. Witness. Jury. New trial. Before Judge HOPKINS. Fulton Superior Court. April Term, 1872.

Isham B. Oneil was placed on trial for the murder of James Little. The defendant pleaded not guilty. The jury returned a verdict of guilty. The defendant moved for a new trial upon the following grounds :

1st. Because the Court erred in omitting to charge the jury that if they should find the defendant guilty, they could recommend that he be confined in the penitentiary for life.

2d. Because the Court erred in admitting, over the defendant's objection, evidence that the person killed was one James Little, when the indictment upon which he was being tried,

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charged him with murdering one James Lutle, another and a different person.

(NOTE BY THE JUDGE.)—"The indictment will disclose the name. I thought it was not Lutle but Little."

3d. Because the Court erred in refusing to charge the jury as follows: "That a homicide may be reduced to manslaughter where no actual assault has been committed on the person of the defendant, and where no attempt has been made to commit a serious personal injury upon the accused. That if one kill another under the fear of a reasonable man that the deceased was manifestly intending to commit a personal injury upon him, amounting to a felony, the killing is justifiable homicide, if the prisoner is under similar fears of some injury less than the felony, the offense is manslaughter and not murder."

"That upon the subject of doubts, the simple rule is, that jurors must not convict without plain and manifest proof of the prisoner's guilt, and that, entrusted as they are with the administration of public justice on the one hand, and with the life, liberty and honor of the prisoner on the other hand, their duty calls on them, before they pronounce a verdict of condemnation, to ask themselves whether they are satisfied beyond a reasonable doubt, that the accused is guilty of the charge alleged against him in the indictment, and that if they entertained doubts as to the law, the prisoner is just as much entitled to the benefit of those doubts, as if they applied to the facts."

"That if they entertained a reasonable doubt as to whether the evidence is applicable to the law as given them in charge, then the prisoner is entitled to the benefit of that doubt, and it would be their duty to acquit."

4th. Because the verdict is contrary to the law and the evidence.

5th. Because the Court erred in charging the jury as follows:

"GENTLEMEN OF THE JURY: You have heard this case patiently, and, I doubt not, impartially, as it was your duty

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to enter the jury box with perfect and complete impartiality. It was your duty to enter the jury box without feeling, without passion, without prejudice, and that duty remains with you through the case, until a verdict of guilty or not guilty has been obtained by you. The time never comes to a juror when he can afford to cease to be an impartial juror. He can have no feeling in the case during the exhibition of the testimony, the argument of counsel, the charge of the Court, nor during the deliberations of the jury; he ends as he begins, an impartial juror.

“The State charges the defendant with the crime of murder, the defendant denies the charge—that makes the issue. The presumption of innocence is in his favor; he begins the trial with that presumption; it is one of law, and belongs to every man who is accused of crime, and it remains with him unto the end, unless the proof, in the meantime, removes that presumption. The case is to be viewed from that standpoint until the contrary appears from the testimony. It is unnecessary, in this connection, to remind you of what has been truthfully stated by counsel on both sides, that to the law and the testimony alone you must look for your verdict. Be sure that you do so. Let your verdict be untainted by prejudice, untainted by any consideration other than that which the juror’s oath suggests. That is the verdict which preserves society and compels men to respect the law—all else is mockery. You cannot know, save from the testimony, whether there be prejudice for the prosecution or against the prosecution. You cannot know whether there is feeling on the part of one man, or set of men, for or against the defendant; and if you know it, of your own private knowledge, you dare not consult it for one moment, in arriving at your verdict.

“It is said, in the indictment, that the defendant, I. B. Oneil, is guilty of the murder of Little. What is murder? It is the unlawful killing of a human being, in the peace of the State, by a person of sound memory and discretion, with malice aforethought, either express or implied. There must be a killing not authorized by law. It must be by a person

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of sound memory and mind. The law presumes every man to be of sound mind till the contrary appears, and the killing must be done with malice aforethought. What the law means by malice aforethought, is this: Malice is a state of the mind—an intention to kill, under such circumstances as the law would not justify, nor in any way excuse the intention, if the killing occurs. I repeat, the intention to take the life of a human being, under such circumstances as would not justify nor excuse that intention, if the killing occurred. You will observe from this, there must be a deliberate purpose to take life; the mind must be made up to act; it must have arrived at the conclusion to kill. This malice may be express or implied. It is express when it is manifested by external circumstances, capable of proof. When this deliberate purpose to take life exists, it is express; when it can be shown by external circumstances, capable of proof, such as preparation for the act, lying in wait, threats to kill, previous grudges—matters of that kind—these are some of the evidences of express malice. Malice may exist, and there may be no evidence of express malice, but it may be implied. As before remarked, it is implied where no considerable provocation appears, and when all the circumstances of the killing show a malignant and abandoned heart. If there is a killing and no considerable provocation appears, and all of the circumstances of the killing show a malignant and abandoned heart, the law implies malice. When an unauthorized killing is shown, the law presumes it was done with malice, unless the proof accompanying it shows that it was not done with malice. If the proof shows an unlawful killing, in the absence of all else, the law implies that it was done with malice aforethought.

“If the proof that shows the killing itself, discloses that it was done without malice, of course the presumption does not exist, but if the accompanying proof does not, then the burden is thrown on the defendant to show it was done without malice. I may remark to you that it matters not from what quarter the proof comes, if it appears that the killing was done and without malice, of course it was not murder. If

one use a deadly weapon, which in the manner that he uses it was likely to produce death, and death ensues, the law presumes that he intended that result, and that presumption remains until removed by proof. This is the offense of murder.

“The next grade of homicide to which your attention is invited, is that of voluntary manslaughter, for it is necessary that you should have a clear conception, not only of murder but of this offense also. Manslaughter is the unlawful killing of a human creature, without malice either express or implied, and without any mixture of deliberation whatever; it may be voluntary upon a sudden heat of passion, or involuntary in the commission of an unlawful act, or a lawful act without due caution and circumspection. In all cases of voluntary manslaughter, there must be some actual assault on the person killing or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstances to justify the excitement of passion and to exclude all idea of deliberation or malice either express or implied. Provocation by words, threats, menaces or contemptuous gestures, shall in no case be sufficient to free the person killing from the guilt and crime of murder. The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible; for if there should have been an interval between the assault or provocation given and the homicide, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and be punished as murder. You will observe in all cases of voluntary manslaughter, there must be some actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstances sufficient to justify the excitement of passion, and exclude all idea of deliberation or malice. What is meant by the expression, “other equivalent circumstances?” Such circumstances as are in effect equal to an assault upon the person killing or an attempt to commit a serious personal injury on the person killing. That is voluntary manslaughter. I give you the

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definition of justifiable homicide, it is the killing of a human being in self-defense or in defense of habitation, property or person, against one who manifestly intends or endeavors, by violence or, surprise, to commit a felony on either. A bare fear of any of these offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable man, and that the person killing really acted under the influence of those fears, and not in a spirit of revenge. You will turn your attention to this testimony and make the inquiry, first, whether the defendant is guilty of the crime of murder. I have given you the definition of that offense, and the rules governing you in that inquiry, as fairly as I can. Is the defendant guilty of murder, as charged in the indictment? Did he unlawfully kill the person named in the indictment? If he killed him, did he do it with malice aforethought, express or implied? If he did he is guilty of murder, and it would be your duty to find him so. If you find that he killed Little, but did not kill him with this malice aforethought that I have before described, inquire if he is guilty of voluntary manslaughter. Was the killing unlawful, and still without malice express or implied, and without any mixture of deliberation in the sudden heat of passion? If it was, the offense would be voluntary manslaughter, and not murder. I will repeat to you, in this connection, a portion of the definition of voluntary manslaughter: In all cases of voluntary manslaughter, there must be some actual assault on the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstances to justify the excitement of passion and to exclude all idea of deliberation or malice, either express or implied; provocation by words, threats, menaces or contemptuous gestures, shall, in no case, be sufficient to free the person killing from the guilt and crime of murder. The killing must be the result of that sudden, violent impulse of passion, supposed to be irresistible. If you should find, as

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before stated, an unlawful killing, but that it was done under such circumstances as I have before explained, and done without this malice aforethought, he would not be guilty of murder, but of voluntary manslaughter.

“If you should find from the testimony in this case, that at the time of the killing, in case a killing be shown, Little manifestly intended or endeavored, by violence or surprise, to commit a felony upon the person of Oneil, and that the circumstances, as they appeared to Oneil, were sufficient to excite the fears of a reasonable man, and he acted under the influence of those fears and not in a spirit of revenge, and he killed Little, it would be justifiable homicide, and it would be your duty to return a verdict of not guilty. Stabbing with a knife, unless it be in one’s defense or other circumstances of justification, is a misdemeanor, unless it is done with intent to commit murder, then it is a felony within the meaning of this law. If one person stab another with a knife, and it is not in his own defense and not under circumstances of justification, and it is not done with the intent to murder, that is a misdemeanor and not a felony. Now apply it to this case. If Little manifestly intended or endeavored, by violence or surprise, to stab Oneil with a knife, and it was not in his own defense, or other circumstances to justify him in doing it, and it was done with intent to murder, that would be a felony within the meaning of this law; and if Oneil, acting under the influence of the fears created by these circumstances, killed Little, it would be justifiable homicide, and he is entitled to a verdict of not guilty. If Little manifestly intended and endeavored by violence or surprise to stab Oneil, not in his own defense, but without intent to murder, and Oneil killed him, but did not act under the fears that were created by these circumstances, but acted in a spirit of revenge, he would not be justifiable and the offense would be murder. If Little manifestly intended or endeavored, by violence or surprise, to commit an offense on the person of Oneil less than a felony (and I have defined that to you,) and Oneil, acting under the influence of those fears, excited by these circumstances, killed Little from

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the influence of those fears, and not from malice, his offense would not be murder, but voluntary manslaughter.

“It is for you to determine, first, whether the offense of murder has been committed. If not, then inquire whether voluntary manslaughter or justifiable homicide, in case you find any killing, has occurred. A man may have malice towards another, and may kill the person towards whom he entertained malice, and the offense may not be murder. But in a case like that, it must appear, from the testimony in the case, that the circumstances were such as to justify him in the killing; when all the circumstances in the case and the proof shows that he was justified in the killing, then the malice, if he had it before, is not to be taken into account.

“I have passed over these various grounds of homicide. I have given you the different definitions, and trust you have a clear understanding of the three grades that are necessary to understand this case. The object of all this testimony is to enlighten your minds in reference to the facts, and determine what are true. You have but the one purpose in view: to ascertain the truth. You sit as exclusive judges of the testimony. You take the law from the Court, the testimony from the witnesses; you weigh, see what it is, and apply one to the other; you judge of them and they enable you to arrive at the truth.

“If there is a theory on which the case can be placed, and all the witnesses speak the truth, that is the true theory, and it is your duty to adopt it. If there is a basis on which you can put the case, and all the witnesses speak the truth, it is your duty to adopt that as true. But if that cannot be done, and the testimony cannot be reconciled, then look to the witnesses. See what is true and what false. You are exclusive judges of this, and in passing upon it, you judge it, not in detached portions, but determine the truth or falsehood of each fact by the light of all the testimony in the case. Take each witness as he appears, and is presented to you by this record, by this testimony, as he appears to you on the stand, and as his statement appeared to you, and from other witnesses

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in the case, determine who is to be believed, what portion is to be believed, and what rejected. If a witness comes before you, and, upon his oath, willfully and knowingly states a falsehood, knowing it to be a falsehood, that witness is unworthy of belief in any particular, it matters not what he testifies to, whether material or immaterial. I repeat, if he states, on oath, a falsehood, knowing it to be false, and intending to swear it, he is not to be believed at all, and before a jury would be authorized to believe what he says, it must come from other sources in the case.

“If a witness states an untruth by accident or mistake and not with a guilty knowledge or purpose, but states it from inadvertence, then that goes to his credit, and it is for you to determine what to believe and what to reject, and in determining that look to all the testimony in the case. A witness may be impeached by proof of general bad character and the opinion of other witnesses based upon that bad character, that they would not believe him on oath; when that is done the witness comes to you with impaired testimony, as before stated in this case; how far his testimony is to be accepted by you, how far it is corroborated by the facts and circumstances in the case, is for you to determine. I might state to you that each witness in the case comes before you with the same presumption of innocence in his favor, and it remains with him until removed by proof to the contrary. The testimony of a witness is to be believed until he is impeached in some of the modes known to the law. Look to all the witnesses in the case; these rules apply alike to them all. Look to the feeling that they may have for or against either of the parties or anything growing out of the case; ascertain what relation they may bear to the case, the state of his mind, then judge of their testimony carefully, calmly, solemnly; you are exclusive judges of that. After you have passed thus over the case, the inquiry will present itself to what extent must I be convinced of his guilt before I find him guilty? What degree of mental conviction shall be mine before I pronounce a verdict of guilty? That I will explain to you. The proof of the de-

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defendant's guilt must be made plainly and manifestly to appear; it must be established to a reasonable and moral certainty. It cannot be demonstrated to absolute certainty, that is unattainable by human testimony in a Court-house. But the mind of a juror must be convinced so that no reasonable doubt remain of defendant's guilt; that is to say, after you have impartially, carefully and solemnly examined and weighed all the testimony in the case, if your mind is still unsettled, wavering, not at rest, it would be your duty to acquit the defendant, for that would be the reasonable doubt of the law; but if your mind is not in that unsettled, wavering condition, it would be your duty to convict. It is not for you to make a doubt and then to act upon it. It must be a reasonable doubt arising in the mind of an honest, impartial juror, that grows out of the testimony or the want of testimony in the case. If that doubt exists, acquit, if it does not, convict him. Take the case and consider it as I have instructed you, and if you should make up your verdict at any time before twelve o'clock to-night, let the sheriff notify me and I will come to the Court-house to receive it, but let not the hour control or influence your decision or deliberations, let not that consideration shorten or lighten your deliberations one single instant. Examine the case carefully. Whether you agree before twelve o'clock or not, it is your duty to observe the utmost circumspection; remain together, consult together, let no two or more of you unless in the presence of the other jurymen, talk about the case. Let all be done and said so that all may hear it. Separate at no time from each other. If you should not agree on your verdict to-night, and remain over to-morrow, the bailiff will be instructed to let you go out to take such exercise as you may find necessary, but on no account pass along the public streets, avoid all crowds or communications, go in retired ways, have no conversation with any one. These rules are not intended in your case alone, but apply to all criminal cases."

The jury was charged on Saturday evening. The evidence,

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being voluminous, is omitted, as not material to an understanding of the decision of the Court.

The motion was overruled, and the defendant excepted upon each of the grounds aforesaid.

The defendant moved in arrest of judgment, upon several grounds, but all of them based upon the allegation that he was charged in the indictment with the murder of James Lutle, while he was convicted of the murder of James Little.

The motion was overruled, and the defendant excepted.

GARTRELL & STEPHENS; T. P. WESTMORELAND; S. B. SPENCER, for plaintiff in error.

J. T. GLENN, Solicitor General, for the State.

TRIPPE, Judge.

1. Objection was made, on the trial below, to the introduction of testimony showing that defendant had killed James *Little*, on the ground that the indictment charged him with the murder of James *Lutle*. On inspection of the indictment, the presiding Judge held the name to be Little. The defendant was served with a copy before arraignment, in which the name was Little. The bill of indictment was read to him on arraignment, charging him with the murder of James Little, and in all the proceedings had, and in the entries on the minutes, that was the name used. Granting that a question might have been raised, whether the name was plainly Little, or that, in some places where it was used in the indictment, it looked as if it could be read Lutle, and if any one will write the two names, it will be seen that, by making the first "t" in "Little" somewhat short, or the dash in crossing these two letters in that name not of full length, how easily it may be made to have that appearance; yet, if this be so, what damage could possibly have resulted to defendant on that account? It was urged in the argument that "a verdict would be no protection to the defendant, nor could it be pleaded in bar of another prosecution against him for the murder of Little without

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aliunde proof," etc. Is this so? If the whole record of the case were introduced or used, showing the verdict, the judgment, and other proceedings, all possible doubt or question as to the name, which could have arisen, would have been settled by the record itself, and it would have sustained the plea of *autrefois acquit*, had it ever become necessary for that purpose. The defendant did not raise the question of surprise, nor could he have done so successfully, for the copy bill and the arraignment used the name of "Little," and the plea of the defendant was accordingly entered.

2. The same reasons constitute a sufficient ground for sustaining the Court below in overruling the motion in arrest of judgment. The Judge had already, on the motion to reject the evidence, held that the name in the indictment was "Little" and not "Lutle."

3. The Court was requested to charge the jury, "that if they entertained doubts as to the law, the prisoner is just as much entitled to the benefit of those doubts, as if they applied to the facts. That if they entertained a reasonable doubt as to whether the evidence is applicable to the law as given them in charge, the prisoner is entitled to the benefit of that doubt, and it would be their duty to acquit." The Judge did not give this request in charge. The defendant was not entitled to the first clause of this request. It uses the word "doubts," without any qualification as to their character, whether they be reasonable or imaginary. Moreover, we do not think the rule as to doubts has ever been carried so far as to be made applicable to the law. If this portion of the request means that the jurors are judges of the law and must acquit, if they have doubts as to what the law is, it certainly goes beyond any decision yet made, and is inconsistent with the next clause of the same request. See *Cook vs. the State*, 11 Georgia, 53, as to whether a Judge is bound to give a defendant the benefit of a doubt about the law. That portion of the request which may have correctly stated the law, though not charged as a part thereof, or in the exact words, was substantially given to the jury in the general charge, wherein they were told

that they were "exclusive judges of the testimony. You take the law from the Court, the testimony from the witnesses, see what it is, and apply one to the other. You judge of them, and they enable you to arrive at the truth," and were further charged, that "the mind of a juror must be convinced, so that no reasonable doubt remains of defendant's guilt; that is to say, after you have impartially, carefully and solemnly examined and weighed all the testimony in the case, if your mind is still unsettled, wavering, not at rest, it would be your duty to acquit the defendant, for that is the doubt of the law." This charge gave the defendant all the benefit he could have claimed under the second branch of that request.

4. It was claimed that the Court erred in the charge as recited in the fourth item in the head-notes to this decision. This charge placed no restriction on the right of the jury to disbelieve any testimony or any witnesses, which, under the law and the evidence, they had the right to reject as unworthy of credit. It was equivalent to the charge so often given, that a jury is not to be quick to impute perjury to any witness, but to reconcile the whole testimony, one part with the other, if they can, and if they cannot, then to do just what they are directed to do in the latter part of this portion of the charge.

5. We cannot see how the defendant could have been injured by the Court telling the jury, that "if you should make up your verdict at any time before twelve o'clock to-night, let the sheriff notify me and I will come to the Court-house to receive it." It was said in the argument that the charge having been given on Saturday afternoon, this was calculated to hasten the jury in their consideration of the evidence and cause them to run over it without due consideration and care. But did not the jury know before the Judge said this, that it was Saturday afternoon and that the next day was the Sabbath? He stated to them that he would meet them, if necessary, at any hour up to twelve that night. That was an assurance that they should have to that time, without any danger of being kept together on the following day, if the verdict was agreed on by that hour; without this, they might

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have reasonably concluded that unless a verdict was rendered at an earlier hour, they would have to remain during the Sabbath. Besides, the Judge added "but let not the hour control or influence your decision or deliberations. Let not that consideration shorten or lighten your deliberations one single instant. Examine the case carefully." Take the whole of the charge together on this point and what was said, provided no verdict was agreed on by twelve o'clock, as to the jury being cared for on the following day, and it would seem that it was calculated to produce a directly contrary effect to that complained of as being likely to follow: See the case of *Hewitt vs Brummell*, decided at the present term.

6. It was further insisted that a new trial should have been granted, because from the evidence the defendant was only guilty of voluntary manslaughter. The main facts of the case are, that a dispute had arisen some two months or more previous to the killing, between defendant and the deceased, about some window sash. A law suit resulted, and defendant succeeded in the case. Out of all this, much bad feeling and a strong grudge grew between the parties, and as shown by the evidence, especially on the part of defendant, very violent threats were made by him against deceased. One witness, Bowen, testified that about a month before the fatal rencounter, defendant, in referring to the difficulty about the sash, said: "If Little ever bothered him or spoke to him on the street about it, he would cut his damned heart strings out. He drew the knife and asked if that would do it." This was the knife which was so fatally used, and was a heavy, large knife of the bowie-knife kind of blade, and was a very deadly weapon. It is true, the general character of this witness for veracity was strongly attacked. But there was other evidence of a similar character. R. M. Antón swore that on Wednesday before the killing on Friday, at DeLay's paint store, on Whitehall street, defendant said in his and DeLay's presence, that "he (defendant) did not owe any one anything but Rice DeLay, and would not have owed him but for Jim Little,

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damned rascal, and he would fix him yet." Mr. DeLay was in Texas at the time of the trial and was not sworn.

Simon Kennedy, who was introduced by defendant, stated that he had heard Little say, "he was not afraid of Oneil's damned bowie-knife," and pulling out a common pocket knife, (witness called it a little knife, the blade about two inches long,) said "that was all he wanted for him," (Oneil.) Witness told this to Oneil, who said, in a low tone, "by God, I don't want him to be afraid of me."

On the day of the killing, defendant and two others were standing on the corner of Marietta and Broad streets, in the city of Atlanta. Deceased, walking down the street, stopped, and the ordinary salutations were given, deceased saying, "howdye, Belton," defendant replying, "howdye." A few remarks were made, the subject of which is not stated in the evidence. Defendant said to Little, "I gained the sash by law." This was the first reference that was made, so far as the evidence shows, to the irritating cause of the bad feeling between the parties, the feeling which was the source of the threats which have been referred to. Little, excited by this taunt or fling at him, replied, "if you did, you swore to a lie to get them." Some of the evidence shows it was probable that Little used the words, "damned lie." Immediately, Oneil struck him in the face with his fist. Deceased caught defendant's arm, and the testimony leaves it somewhat in doubt whether he struck Oneil. Some of it makes it quite probable, if not positive, that he did, or struck at him. Defendant thrust his hand under his coat behind and drew his knife and stabbed deceased, about two inches above the groin, inflicting a wound between five and six inches deep, about two inches wide, having a jagged appearance, as if the knife had been plunged in and drawn out. The knife had the effect to do a considerable more cutting by that means. Dr. Heery, the witness who thus describes the wound, further describes how the intestines were cut, and the fatal character of the wound, and stated that the knife might turn itself in drawing out. Deceased fell, and defendant immediately ran down the

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street, having put the knife in his bosom. The cry was raised to arrest him and he ran into a store and put the knife behind some boxes, and was arrested at the door as he came out. Deceased died that night from the wound. These are the main facts in the case. Was the jury authorized, from them, to find a verdict of guilty of murder against defendant?

Murder is the unlawful killing of a human being * * * with malice aforethought, either express or implied. Manslaughter is the unlawful killing, without malice, either express or implied, and without any mixture of deliberation whatever, which may be voluntary, upon a sudden heat of passion, or involuntary, in the commission of an unlawful act, or a lawful act, without due caution and circumspection. The Code, section 4259, further says: "In all cases of voluntary manslaughter, there must be some actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstances to justify the excitement, and *to exclude all idea of deliberation or malice*, either express or implied. Provocation by words, threats, menaces or contemptuous gestures shall, in no case, be sufficient to free the person killing from the guilt and crime of murder. The killing must be the result of that sudden violent impulse of passion supposed to be irresistible," etc.

Take, then, the case as it was presented to the jury. There was the grudge existing between the parties, the defendant's threats, his quickness to allude tauntingly to the cause of the bad feeling, the instant reply, by a blow, to the words drawn from the deceased by that allusion, the almost instant use of a very deadly weapon, (the weapon with which he had threatened to kill, in a savage manner,) the terribly fatal manner in which he did use it, his immediate retreat after the fatal stab, and concealing the weapon, and the fact that deceased showed no weapon; and can it be said that the killing was done under circumstances that excluded "all idea of deliberation or malice, either express or implied?" The jury found that it did not; the Court trying the case refused to intervene

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against their finding. We feel that the proper enforcement of the law and the safety of human life, and its protection against a too ready disposition, fearfully prevalent, to murderously strike, cut or shoot on the first or least provocation, forbid our interference.

The jury had the right to believe, and doubtless did so believe, that the defendant had determined to kill deceased whenever the subject that caused the ill blood was raised or discussed between them. If so, that, beyond doubt, made it a case of murder.

Judgment affirmed.

J. S. JONES, DRUMRIGHT & COMPANY, plaintiffs in error, *vs.*
H. C. THACHER & COMPANY *et al.*, defendants in error.

The granting or refusal to grant an injunction is vested by law in the discretion of the Judge of the Superior Court, to whom the application is made, and being so vested, it was manifestly intended that he should exercise that discretion, on the statement of facts exhibited to him, and the Supreme Court will not interfere unless some well established rule of law, or principle of equity, has been violated. (R.)

Injunction. Before Judge HALL. Spalding county. At Chambers. March 1st, 1873.

For the facts of this case, see the decision.

SPEER & STEWART, for plaintiffs in error.

LANIER & ANDERSON, for defendants.

WARNER, Chief Justice.

This was a bill filed by the complainants against the defendants, praying for an injunction to restrain the collection of a *fi. fa.*, issued from the District Court of the United States for the Northern District of Georgia, out of certain described funds in the hands of the sheriff of Spalding county,

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arising from the sale of the property of one Sindall, the defendant in said *fi. fa.* The Judge refused the injunction prayed for, and the complainants excepted. The main ground of equity alleged in the bill is, that upon the information and belief of the complainants, the judgment obtained in the United District Court, on which the *fi. fa.* issued, was obtained by collusion and fraud between Thacher & Company and Sindall, the plaintiffs and defendant therein; that Sindall did not, in fact, owe the plaintiffs the debt for which the judgment was rendered. There are two affidavits in the record in relation to that matter: one made by Sindall, the defendant, and the other made by one of the plaintiffs in the *fi. fa.* The legal presumption is in favor of the fairness and legality of the judgment and execution issued thereon. The complainants attack it upon their information and belief only, and upon the questionable statement of Sindall, the defendant in that judgment. The affidavit of Thacher, one of the plaintiffs in the judgment, states positively that the debt for which it was rendered was due the firm of Thacher & Company by the defendant, Sindall. On this evidence, the presiding Judge in the Court below refused to grant the injunction.

The granting or refusal to grant an injunction is vested by law in the discretion of the Judge of the Superior Court, to whom the application is made, and being so vested, it was manifestly intended that that officer should exercise that discretion, on the statement of facts exhibited to him, and this Court will not interfere with the exercise of that discretion, unless some well established rule of law or principle of equity has been violated, which is not disclosed by the record in this case.

Let the judgment of the Court below be affirmed.

The Southern Express Company vs. Palmer & Company.

THE SOUTHERN EXPRESS COMPANY, plaintiff in error, vs.
S. & J. PALMER & COMPANY, defendants in error.

1. An action against a common carrier for negligence in the performance of his duty as a carrier, under a contract to carry, is an action upon the case, *ex delicto*, and may be joined with a count in trover or trespass *vi et armis*, but if the action be for negligence alone, under the contract to carry, or if the counts in trover or trespass *vi et armis*, be abandoned, the plaintiff cannot repudiate the contract, either expressed or implied, under which the carrier received the goods, and recover for an unlawful taking.
2. A carrier who receives goods to carry from one not authorized to deliver them to him, is a trespasser, and may be sued in trover for the goods, as any other illegal taker may be; but if a suit be brought against him as a carrier, charging him with having taken the goods under a contract with the plaintiff's agent, and with neglect of duty under the obligations of that contract, and there be no count for a wrongful taking or conversion, the plaintiff can only recover for a breach of duty, under the contract, as made with his agent.
3. If one adopt a contract made with his agent, who had no authority to make such a contract, he must adopt it entirely; he cannot adopt a part and repudiate a part.
4. The contract in the record between the Adams Express Company and the Southern Express Company is an express contract, signed by both parties, in which it is specifically agreed that the Southern Express Company should not be liable for "river risks" on any goods delivered to it for carriage by the Adams Express Company, and if the owner of the goods sue the Southern Express Company, not as a tortious taker, but as a carrier under that contract, for negligence, by which the goods were lost, he must abide by its terms. *Aliter*, if he sue in trover or in trespass for an illegal taking or conversion.
5. The case of the *Southern Express Company vs. Shea*, 88 Georgia Reports, 519, and the case of the *Southern Express Company vs. Cohen & Menko*, 45 Georgia Reports, 148, are, as to the facts and the pleadings, similar to the present case, and must control it.
6. If an action upon the case, against a common carrier for negligence, under his contract, be brought within four years, and, after four years have elapsed, the plaintiff amend his writ by adding a count in trover, and a count for trespass *vi et armis*: *Query*—whether the new counts are barred?

Pleading. Contracts. Negligence. Ratification. Statute of limitations. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1873.

The Southern Express Company vs. Palmer & Company.

S. & J. Palmer & Company brought case against the Southern Express Company for \$1,000 00 damages. The declaration contained the following allegations: That on October 26th, 1865, plaintiffs, by their agent, the Adams Express Company, delivered to the defendant, at Savannah, Georgia, a box containing goods and chattels of the value of \$426 25, to be carried to Columbus, Georgia, and there to be delivered to plaintiffs. That the defendant, not regarding its duty as a common carrier, but fraudulently intending to defraud and injure plaintiffs, did not convey said box, with its contents, from Savannah to Columbus, nor, at Columbus, deliver the same to plaintiffs. That the defendant, on the contrary, conducted itself so negligently and carelessly, in reference to said box, that the same was lost to the plaintiffs at Savannah, on the day and year aforesaid.

The declaration was filed on October 23d, 1866. On May 28th, 1872, the declaration was amended by the addition of two counts: one in trespass, and one in trover.

The defendant pleaded the general issue, the statute of limitations, and specially, that it received the said box and its contents from the Adams Express Company, under a special contract with said company, with the terms of which contract he has fully complied.

The evidence made the following case: On the 23d day of October, 1865, the plaintiffs purchased from White, Whitman & Company, in New York, goods to the amount of \$426 25, which were delivered to the Adams Express Company on the 25th day of the same month, for transportation to Columbus, Georgia, there to be delivered to the plaintiffs, and the following receipt taken:

“ADAMS EXPRESS COMPANY,

“ Great Eastern, Western and Southern Express Forwarders.

“No. 1.

NEW YORK, October 25th 1865.

“Received of White, Whitman & Company, one case, dollars, marked S. & J. Palmer & Company, Columbus, Georgia.

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“Which it is mutually agreed is to be forwarded to our agency nearest or most convenient to destination only, and there delivered to other parties to complete the transportation.

“It is part of the consideration of this contract, and it is agreed that the said Express Company are forwarders only, and are not to be held liable or responsible for any loss or damage to said property while being conveyed by the carriers to whom the same may be by said Express Company entrusted, or arising from the dangers of railroads, ocean or river navigation, steam, fire in stores, depots, or in transit, leakage, breakage, or from any cause whatever, unless, in every case, the same be proved to have occurred from the fraud or gross negligence of said Express Company or their servants; *unless specially insured by it and so specified on this receipt*, which insurance shall constitute the limit of the liability of the Adams Express Company in any event; and if the value of the property above described is not stated by the shipper at the time of shipment and specified in this receipt, the holder hereof will not demand of the Adams Express Company a sum exceeding *fifty dollars*, for the loss of, or damage to each package herein receipted for. Nor shall the said company be held responsible for the safety of said property after its arrival at its place of destination.

“*And if the same is entrusted or delivered to any other Express Company or agent, (which said Adams Express Company are hereby authorized to do,) such company or person so selected shall be regarded exclusively as the agent of the shipper or owner, and as such, alone liable, and the Adams Express Company shall not be in any event responsible, for the negligence or non-performance of such company or person; and the shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to, and inure to the benefit of each and every Company or person. In no event shall the Adams Express Company be liable for any loss or damage unless the claim therefor shall be presented to them, in writing, at this office, within thirty days after this date, in a statement to which this receipt shall*

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be annexed. All articles of glass, or *contained in glass*, or *any of a fragile nature*, will be taken at *shipper's risk only*, and that the shipper agrees that the company shall not be held responsible for any injury, by breakage or otherwise, nor for damage to goods not properly packed and secured for transportation. It is further agreed that said company shall not in any event be liable for any loss, damage or detention caused by the acts of God, civil or military authority, or by insurrection or riot, or the damages incident to a time of war.

“Freight For the company,
(Signed) “R. H. HAMMOND.”

The Adams Express Company delivered said case at Savannah, Georgia, to the defendant, and it was entered on the manifest of the defendant to go up the Savannah river to Columbus via Augusta. It was received at Savannah on or about October 30th, 1865. Seven dollars and fifteen cents was to be paid by the plaintiffs to the defendant on the delivery of the case to them at Columbus, Georgia. Three dollars and twenty-five cents of this amount was due to the Adams Express Company for transportation from New York to Savannah, and the balance of the amount would have become due to the defendant for transportation from Savannah to Columbus, Georgia. The case was shipped at Savannah on the steamboat “Savannah,” to be transported to Augusta. This boat and a large portion of its cargo, including this case, were lost on the Savannah river. The contract between the Adams Express Company and the defendant contained the following provisions:

“3. That all the goods, wares and merchandise, and other property delivered by said Adams Express Company to the Southern Express Company, shall be received by the latter Company upon the same terms and conditions as are expressed in the printed receipts, used and issued by it, upon the receipt of similar shipments from the public generally, and upon no other terms and conditions. And that no other or greater liability shall attach to the said Southern Express Com-

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pany upon the delivery to it of any such property, than such as arises under such printed receipts. The provisions of this stipulation shall take effect on each delivery of property hereunder in like manner as if one of such printed receipts had been issued to the said the Adams Express Company on such delivery."

"5th. The phrase, 'printed receipts,' as herein used, shall include the forms now in use by the said two Express Companies and any subsequent modification thereof, that either Company adopts. The terms and times of settlement between the two Companies shall remain as heretofore agreed upon."

The jury returned a verdict for the plaintiffs for \$650 00. Whereupon the defendant moved for a new trial upon the following grounds to-wit:

1st. Because the Court erred in overruling the motion of defendant to strike the second and third counts in the declaration on the ground of misjoinder.

2d. Because the Court erred in the following charge to the jury: "Did the Southern Express Company ever receive these goods? Did it receive these goods as the goods of the plaintiffs, and were they lost and that loss not explained? Then it is liable to the plaintiffs for the loss. If it received these goods from the Adams Express Company as a common carrier, as the goods of the plaintiffs, to be delivered to plaintiffs in the city of Columbus, then it received them as a common carrier liable to plaintiffs, if they were lost through the neglect of the Company, and it matters not what the terms were between the Adams and the Southern Express Company. The receipt says it *may* be delivered, and when plaintiffs shipped, they authorized the delivery and the taking by the Southern Express Company from the Adams Express Company was the same as if the taking had been directly from Palmer. If the evidence is that the defendant received the goods from the plaintiffs, or from the Adams Express Company as the goods of plaintiffs, they are bound if the goods were lost by their neglect."

3d. Because the Court erred in the following charge to the

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jury: "The defendant is sought to be made liable for the loss of the goods, and its liability to the plaintiffs does not depend on the contract it may have made with the Adams Express Company, but depends upon the fact whether it did receive them as the property of the plaintiffs and the terms upon which the defendant so received them, and the evidence will be looked to by the jury, to determine whether the defendant received them and the terms and conditions upon which they were received, and among these terms and limitations the jury will determine from the testimony, if defendant received them, whether the defendant did by express contract limit its liability for loss to the neglect of itself or agents or fraud on their part. If then, the defendant received these goods to be delivered to the plaintiffs in Columbus, and the goods were lost while in its possession, the presumption of law is that they were lost through the neglect of defendant, and unless it is shown by the proof in the case that they were lost without the neglect of the defendant, defendant is liable to the plaintiffs for the value of the goods when so lost. Neglect by the carrier covers any loss unless it happens by the act of God or the public enemies. If the loss happened by any other cause, though the defendant be not in fault, it will not be excused thereby."

4th. Because the Court erred in refusing to charge the jury as follows: "The Adams Express Company, under the receipt read in evidence, is bound to the plaintiffs for the safe delivery of the goods at Columbus, and not the defendant."

5th. Because the Court erred in refusing to charge the jury as follows: "If the Adams Express Company delivered the goods to the defendant under an express contract between the Adams Express Company and the defendant, the liability of the defendant is to the Adams Express Company, and not to the plaintiffs."

6th. Because the verdict of the jury is contrary to the following charge: "If the plaintiffs adopt the act of the Adams Express Company in delivering the goods to the defendant, under an express contract between the Adams Express Com-

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pany and the defendant, then the defendant is liable under that contract, upon a suit brought on that contract, and is entitled to all the defenses provided for by that contract, and if loss by water is one of the defenses provided for, and these goods were lost by water, without the neglect of defendant, defendant is not liable. If the defendant received these goods from the Adams Express Company, under a contract with the Adams Express Company, the Adams Express Company could not substitute the plaintiffs in the contract instead of the Adams Express Company, without the consent of the defendant. A party making a contract has a right to elect with whom he will contract.

“If more than four years have elapsed since the conversion or trespass complained of, prior to the filing of the amended declaration in which those two counts are embraced, then the plea of the statute of limitations filed in this case is a bar to the counts in trover and trespass.”

7th. Because the verdict was contrary to the law and the evidence.

The motion was overruled, and the defendant excepted upon each of the grounds aforesaid.

R. J. MOSES, for plaintiff in error, cited : The So. Ex. Co. *vs.* Shea, 38 Ga. R., 521 ; Herman on Estoppel, 343 ; Mosher & Co. *vs.* The So. Ex. Co., 38 Ga. R., 37 ; Cohen & Menko *vs.* The So. Ex. Co., 45 Ga. R., 148.

HENRY L. BENNING, for the defendants.

1st. An action on the case is an action *ex delicto* : 1 Chitty's Pleadings, 133, 134 ; 3 Black. Com., 122.

2d. A common carrier may be sued in case or *assumpsit* : 1 Chitty's Pleadings, 134-5-8 ; 3 East. R., 62 ; 1 Tidd's Pr., 10 ; Code, secs. 2904, 2905, 2975.

3d. The owners elected to sue in case : 2 Chitty's Pleadings, 650-1-2 ; 2 Lord Raymond, 909 ; *Ibid.*, 1516 ; 6 B. and C., 268 ; 1 Durn. and E., 273 ; 1 Kelly R., 261.

4th. Defendant was estopped from saying it was not acting as a common carrier : Coke on Litt., 148.

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5th. The plaintiffs ratified and adopted the act: Story's Ag., 242, 244, 213; 13 East., 274.

6th. Where there are a succession of wrong-doers, the plaintiffs may elect which to sue: Bac. Ab., B; 9 Cush., 24.

7th. Shea's case was treated as an action *ex contractu*: 13 Ga. R., 261.

8th. The limitations in the receipt are void: The So. Ex. Co. vs. Purcell, 37 Ga. R., 103.

McCAY, Judge.

The facts of this case are precisely the same as appeared in the case of the *Southern Express Company vs. Shea*, 38 Georgia, 531, and in the case of the *Southern Express Company vs. Cohen & Menko*, 45 Georgia, 148. It may be added, too, that the form of the action is also the same, to-wit: an action upon the case against the Express Company as a common carrier, for negligence. It would seem to follow, that this case must take the same course as did those cases. The decision in the case of *Shea vs. The Southern Express Company* necessarily follows from the unanimous decision of this Court in *Purcell's* case, 37 Georgia, 103, and in the two cases in the 36 Georgia, 532, 635. This Court in those cases had, by an unanimous decision, held that a common carrier, accepting, as such, goods to be delivered at a distant point, was bound to deliver them at that point, at all events, unless prevented by the act of God or the public enemy, and that though the carrier might, by express contract with the shipper, limit this liability, he could not do it by entering such limitation on or in his receipt for the goods. It was the logical result of these decisions that Shea had no right of action against the Southern Express Company as a *common carrier* under the facts as they appeared in the record. The *contract* to carry was made by the Adams Express Company, and no right of action on *that contract* existed in *Shea vs. The Southern Express Company*. The action in Shea's case, as in this, was, it is true, an action on the case. That is, it was an action for negligence in the performance of a duty which it was charged

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it had *undertaken*. But however the action sounded, it had its foundation in, and was dependent for its support upon either an express or implied contract to perform the duty alleged to have been neglected. Indeed every action against a common carrier, as such, *for negligence*, must of necessity be based upon either an express or implied contract for *diligence*.

The declaration in Shea's case and in this, is against the Southern Express Company as a common carrier; it alleges that the defendant *undertook* to carry, etc., that it neglected the duty it *took upon itself*, by means of which the plaintiff was injured. And this is so in all actions of this character. Actions against tradesmen, doctors, innkeepers for *negligence*, are all based on contract, either express or implied, and though they are called actions on the case, they require for their support, proof of such a state of facts, as shows either an express or implied undertaking, contract, by the defendant, to be skillful and diligent. An action against a common carrier, as such, for negligence, must fail if the proof show a want of this fundamental undertaking or contract. The very bringing of the action presupposes that the carrier has the goods properly under a contract to perform a specified duty towards them, and the ground of the action is that by neglecting such duty he has damaged the plaintiff. The *tort*, which is the cause of action, is not that he *took* the goods wrongfully, but that having them under contract, to be diligent in carrying them, he has neglected that duty. To sustain the action in Shea's case, and in this, to-wit: an action for negligence, it was necessary to show either an express or implied contract of the Express Company with the shipper to be diligent. The contract shown in both cases, was not with the Southern Express Company at all, but with the Adams. And the majority of the Court in the Shea case, held that for this reason the plaintiff could not recover. The present Chief Justice in that case, said that the defendant was not sued as a *tort feasor*. What he meant, as the whole context shows, was, that he was not sued for a wrongful *taking*. The action there as well as

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here, was case, for negligence, which, as we have shown, necessarily assumes that the defendant was in possession lawfully, under a contract to be diligent. Had the action been in trover or trespass for *wrongful taking*, and the proof had shown that the Southern Express Company, without authority took or got into possession of plaintiff's goods, it could have made no reply, but the production of the goods or payment of the damages. Even the act of God would have been no excuse.

But in the Shea case and in this, the very foundation of the action—the allegations in the declaration—are that the defendant got the goods under a contract, and the complaint is, that having undertaken a duty with regard to them, it has neglected it and thereby damaged the plaintiff. The majority of the Court in the Shea case held, that as the action was for the neglect of the Southern Express Company to perform as it had undertaken, to-wit: with the care and diligence of a common carrier, and as there was no proof of any contract, either express or implied, by the Southern Express Company, the plaintiff must fail, and that Judge Cole's charge as to the liabilities of a *tort feasor* was improper under the allegations. As to myself, whilst I felt bound by the decisions in Purcell's case, and the other common carrier cases, in 36 and 37 *Georgia*, I was of the opinion that Shea had a right, if he pleased, to adopt the contract made by the Southern Express Company with the Adams. Such a contract had undoubtedly been made, and the goods had been received by the Southern Express Company under it. It was my opinion that the owner of the goods had the right to adopt this contract—to ratify the act of his assumed agent, even though, at the date of the contract, he had given no such authority. The Adams Express Company had assumed to act as the agent of the owner, and as such, the Southern Express had contracted with the owner, through the Adams, to carry. True, the agent had no such authority. But the authorities are numerous that if one profess to act as my agent, and contract as such with a third person, I may, if I please, ratify the contract and sue upon it in my own name: See the cases quoted in 38

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Georgia, 530. But if I do so I must ratify the contract as it is.

It is contended that the contract made by the Adams with the Southern does not except river risks, and that I was mistaken in supposing the adoption of it would have done Shea no good. I am free to say that I, at that time, did not carefully examine the contract between the companies. It was admitted in the argument, by both sides, that, under it, the Southern was not liable for river risks, and I did not examine it closely for that reason. But I have now done so, and that, too, after the very elaborate and ingenious argument of Judge Benning as to its meaning. I still think it is an express contract, exempting the Southern Company from river risks. It is signed by both parties, and in it there is an express stipulation that the Southern shall only be bound according to the *terms of the receipts* then in use. On looking at those receipts, it appears that river risks *are* excepted. True, this Court has held that, as against shippers who do not sign the receipts, these limitations of the liability of the carrier are void. But if we are to treat the Adams Express as the agent of Shea, it follows that, as the Adams did sign as well as the Southern, that Shea, the owner, the ratifier, the principal, signed by his agent, and there is a contract. The agent knows what is in the receipt; he *agrees* to be bound by its terms. He stands as did Matthews, in the case of *Wallace vs. Matthews*, 39 *Georgia*, 617. The count in trover was stricken out, and we say nothing about that. We are not, at present, prepared to say whether the statute would bar it or not. Perhaps, as this action, as it stands, is an action on the case, sounding in *tort*, and as a count in trover might have been joined, the writ may be amendable by adding such a count, even after four years, or after 1st January, 1870. But we express no opinion, as the point is not made, and there has been no argument on it.

Judgment reversed.

Gerrard vs. Moody.

**WILLIAM U. GARRARD, executor, plaintiff in error, vs.
CHARLES D. MOODY, defendant in error.**

1. The purchaser of cotton, who stores the same with a warehouseman, is liable for the storage, notwithstanding he is the agent of a third party in making the purchase, unless he disclose the fact of his agency, and his principal to the warehouseman.
2. If, after such storage, the bailee ascertained the agency, and elected to go on the principal for his claim for storage he would be bound by such election; and when the Court charged this principle, and further charged, that, "To make inquiries as to whether the principal be liable, to request that his accounts be forwarded to the principal to ascertain if he will pay them, will not be an election, there must be an intent to look to an ascertained principal alone for payment to constitute an election," it was not error—the more especially when the whole charge is looked to in connection with the evidence on this point in this case.
3. When the Court fully and distinctly leaves the questions as to agency and election to the jury, it was not error—at least not such error as to authorize a new trial, for the Court to have refused to allow a witness to testify: "That after the presentation of the account to A. B. (the alleged principal) by the attorney of defendant, which fact was known to the executor of the purchaser of the cotton, the executor paid to A. B. about \$8,000 00 due by the testator to A. B. on a guaranty."
4. Such evidence may exhibit the equity of the principle why an election should discharge the agent, but it would not tend to establish the point in issue, as against the creditor, to-wit: Had he made an election?
5. Under a warehouseman's receipt as follows: "Received from W. U. Garrard, one hundred and twenty-seven bales of cotton, marked, numbered, etc., as per margin, (the marks, etc., being given) subject to this receipt only on paying customary charges and all advances, acts of providence and fires excepted," the warehouseman has not only a lien on the cotton, but the consignor is liable for the customary charges that may accrue, and his liability continues until he may sell and give notice to the warehouseman, unless he be discharged by the act or consent of the warehouseman.

Warehouseman. Bailment. Principal and agent. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1872.

William U. Garrard, as executor of W. W. Garrard, deceased, brought complaint against Charles D. Moody, on a

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due bill for \$100 00, dated August 15th, 1865. The defendant pleaded as follows: 1st. The general issue. 2d. That the due bill was merely given by him as a memorandum of an amount of money advanced to him by said W. U. Garrard to pay his (defendant's) expenses in going to Mobile on business for said Garrard, and that the amount set forth in said receipt was actually expended in that way. 3d. That said Garrard was indebted to defendant at the time of his death, for storage of cotton, and for personal services rendered, in the sum of \$1,079 00, which he pleads as set-off, and prays judgment for the same.

The receipt under which the defendant held testator's cotton, was as follows :

MARKED | "Received from W. U. Garrard, one hundred
C. D. M | and twenty-seven bales of cotton, marked, numbered, etc., as per margin, subject to this receipt only, on paying customary charges and all advances, acts of providence and fire excepted.

(Signed)

"C. D. MOODY."

The defendant proved that the charges for storage were reasonable.

The plaintiff, in rebuttal, introduced R. J. Moses, Esq., who testified as follows: That defendant came to him, as an attorney, a few days before the death of W. W. Garrard, to collect several cotton storage bills, among others one against Denniston & Company, the items of which were the same as in the bill now sued on. That witness took it to Garrard, as the agent of Denniston & Company, to get him to forward it. That Garrard treated the bill with derision, and witness so advised defendant. That Garrard died a few days afterwards. That witness then, at the request of defendant, sent the bill direct to Denniston & Company.

Plaintiff further proposed to prove by this witness that, "after the presentation of the account to Denniston & Company, by him as the attorney of defendant, which fact was known to the plaintiff, the plaintiff paid to Denniston &

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Company \$8,000 00, due by testator to them on a guaranty." On objection made, this evidence was excluded by the Court, and plaintiff excepted.

The jury returned a verdict for the defendant for \$650 00 with interest from December 20th, 1865. Whereupon the plaintiff moved for a new trial upon the following grounds:

1st. Because the Court erred in excluding the testimony of R. J. Moses Esq., above set forth.

2d. Because the Court erred in charging the jury, "that to make inquiries as to whether the principal be liable, to request that his accounts be forwarded to the alleged principal to ascertain if he will pay them, will not be an election; there must be an intent to look to an ascertained principal alone for payment to constitute an election."

3d. Because the Court refused to charge the jury, "that under the receipt introduced in evidence, no one is liable but the cotton and the party who holds the receipt and has the right to demand the cotton under the receipt. The liability is upon the cotton and the holder of the receipt, and upon no one else."

The motion was overruled, and the plaintiff excepted upon each of the aforesaid grounds.

R. J. MOSES; W. U. GARRARD, for plaintiff in error.

PEABODY & BRANNON, for defendant.

TRIPPE, Judge.

It is a principle running through the whole doctrine of agency, that where an agent does not disclose the fact of his agency, he is liable, personally, on his contracts. If the party with whom he deals discovers that he is but an agent, such party may hold the principal responsible: 15 East., 67; 9 B. & C., 78. He may hold either the agent or the principal accountable, but if he elects to go on the principal, he is bound by that election: Chitty on Contracts, 206. But the simple fact that the agent refuses to pay, and the creditor requests his

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attorney to forward the account to the alleged principal, or, in other words, to try to get payment wherever he could, is not, of itself, an election. If the creditor, when he ascertains that there is a principal who is liable, accepts him as the debtor, and looks exclusively to him, the creditor cannot afterwards recover from the agent. The Court charged this, and it was not error to add what is objected to in the second ground of exception: Story on Agency, 291, and note.

The Court fully and distinctly left the questions, both of agency and election, to the jury. If the creditor knew of the agency at the time the debt was created, the agent was not liable. If the creditor elected to go on the principal, after the fact of agency was ascertained, as before stated, the agent was no longer liable. But what the agent himself did, as to settling with his principal, throws no light on the question as to whether he was an agent in this particular case, or whether the creditor had made such an election as would discharge him. If he were, in fact, the agent, and such election had been made by the creditor, then the fact proposed to have been proven would have strongly exhibited the equity of the rule. But, under the charge the Court gave, "that an election by the creditor to go on the principal bound him," the testimony was wholly immaterial. Under the charge, there were but two questions on this branch of the case: Was plaintiff an agent? Did the defendant make an election? With those two questions, which left it as favorable to the plaintiff as he could ask, it did not matter whether or not the evidence was admitted. The jury found against the plaintiff on these questions.

The general principle is, that a bailee for hire, not only has a lien on the thing deposited for payment of charges, but the bailor is personally liable. We know of no rule of law that will take cotton stored with a warehouseman, out of the operation of that principle. The goods or cotton, may be lost or destroyed without the fault of the bailee, the warehouseman. There is no reason why he should lose his services, any more than the keeper of a livery stable, a landlord, or any other

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bailee. If it be necessary for the interests or convenience of the planter that this rule should be changed in relation to cotton, and that the warehouseman should look to the cotton or to whomsoever his receipt for the cotton may be transferred, it must be done by legislation.

Judgment affirmed.



AUGUSTUS STUDDARD, plaintiff in error, vs. SAMUEL LEMMOND, defendant in error.

Where land was sold under a judgment obtained against the defendant in the United States District Court, of older date than the levy of an attachment returnable to a Superior Court of the State, but the levy of the execution, based upon said judgment was made after the levy of said attachment, and the plaintiff in attachment was present at the marshal's sale when the claimant purchased, and made no objections, the purchaser obtained a valid title. (R.)

United States Court. Attachment. Judgment. Marshal's sale. Waiver. Before Judge ROBINSON. Morgan Superior Court. September Adjourned Term, 1872.

For the facts of this case, see the decision.

REESE & REESE, for plaintiff in error.

A. G. & F. C. FOSTER, for defendant.

WARNER, Chief Justice.

This was a claim case which was tried in the Court below and a verdict finding the land levied on subject to the plaintiff's execution. A motion was made for a new trial, which was overruled, and the claimant excepted. The plaintiff levied an attachment on the defendant's land on the 8th of December, 1869, obtained judgment thereon 10th of March, 1871; execution issued upon that judgment, and was levied on the land, 29th of August, 1871. The claimant purchased

the land at a United States marshal's sale, and claims title under the marshal's deed to him, dated 7th February, 1871. The judgment under which the marshal sold the land was obtained in the United States District Court, 26th of September, 1868; execution issued thereon 2d November, 1868, and was levied by the marshal on the land, 7th of January, 1871, and sold by him, 7th of February, 1871. The vendor's lien and the homestead questions both being out of the case, the only question made before this Court on the argument was as to the validity of the marshal's levy on the land, when it had already been levied on by an attachment issued by the State Court. The judgment obtained in the United States District Court is of older date than the date of the levy of the plaintiff's attachment, but the levy of the attachment is of older date than the levy of the United States District Court execution, by the marshal. This question does not appear to have been made or decided in the Court below, but it appears, from the evidence in the record, that the plaintiff in the attachment judgment was present at the marshal's sale when the claimant purchased the land, and took no proceedings to prevent the sale of the land under the marshal's levy, nor made any objections thereto, and the marshal having sold the land apparently under the prescribed forms of law, in satisfaction of the oldest judgment lien against the defendant, the claimant, as a purchaser at that sale, obtained a good title to the land; although there may have been an irregularity in making the levy on the land by the marshal when the land had been previously attached by process from the State Court: Code, 2586. In our judgment, the Court below erred in overruling the motion for a new trial in view of the facts disclosed in the record.

Let the judgment of the Court below be reversed.

Redd vs. The Muscogee Railroad Company.

JAMES K. REDD, executor, plaintiff in error, vs. THE MUSCOGEE RAILROAD COMPANY, defendant in error.

1. Where one bought a negro slave at sheriff's sale, and permitted him to remain with the defendant to use as his own, and he was so used for years, persons dealing with the said defendant with no knowledge of who is the true owner, have a right to consider the slave as the property of the person thus "using him as his own."
2. When, during the late war, a company of men organized as soldiers, though unarmed, were on their way from Columbus to Atlanta, with the open intent to offer themselves to Governor Brown for service as soldiers in the Confederate army, and a railroad company received them on its cars as soldiers, with their baggage, the transportation to be paid for by the State or Confederate authorities:
Held, That both the company of men and the railroad company were engaged in an illegal transaction, and the rule *in pari delicto*, etc. applies to a suit against the railroad company for negligence in its duty as a common carrier.
8. But when it appeared by the proof that one of the soldiers having with him a negro slave, and the railroad company refused to carry the slave as a soldier, or as a part of or adjunct to the company, but demanded and received from the soldier fare for said slave as an ordinary passenger, the rule *in pari delicto* does not apply, and if the owner of the slave is injured by the negligence of the road, he can recover for the injury.

Estoppel. Title. Confederate States. *In pari delicto*. Railroads. Before JOHN PEABODY, Esq., an attorney at law, presiding by consent. Muscogee Superior Court. May Term, 1872.

James K. Redd, as executor upon the estate of Owen Thomas, deceased, brought case against the Muscogee Railroad Company, alleging that the defendant had damaged him in the sum of \$2,500 00; for that, on August 1st, 1861, plain- was possessed of a negro man named Floyd, of the value of \$2,000 00, and the defendant was possessed of and had charge of the Muscogee Railroad, and not regarding its duty while the said negro man was on the cars of said defendant, but, through its carelessness and mismanagement, ran the cars and engine off its track, thereby killing the said negro man. The record fails to disclose any plea.

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The evidence makes the following case: The negro was raised by Micajah W. Thweatt, the brother-in-law of Owen Thomas, deceased, but was sold by the sheriff for his debts, and purchased by said Thomas, who permitted the boy to remain in Thweatt's possession, as if he was his own property. The negro was thus under his control when he was killed. He was worth from \$1,600 00 to \$2,000 00. The negro embarked at Columbus, on defendant's train, for Macon, on August 14th, 1861. He accompanied Thweatt's son, Robert, as a servant. Robert Thweatt was a member of a volunteer company, then going to Atlanta for the purpose of offering its services to Governor Brown, in the war then being waged between the United States and the Confederate States. Robert Thweatt paid the fare of the negro to the defendant, as it declined to transport him otherwise, alleging that he was not a soldier. There was a gap in the embankment of the railroad, about sixteen miles from Columbus, into which the engine and the front car were thrown, thereby causing the death of the negro. Robert Thweatt served with his company in the army of the Confederate States, in the war then going on. The defendant was never paid for transporting the troops on this occasion, though it expected compensation from the Confederate States or the State of Georgia. The defendant considered itself bound to transport the soldiers, though no force was used. It did not refuse to carry them. There were some guns among the men.

The testimony in reference to the negligence of the defendant is omitted, as unnecessary to an understanding of the decision.

The jury returned a verdict for the defendant. The plaintiff moved for a new trial, upon the following grounds, to-wit:

1st. Because the Court erred in the following charge to the jury: "That, although the title to Floyd might have been in Owen Thomas, yet, if he was allowing his brother-in-law, M. W. Thweatt, to have the general use and control of Floyd, as his own property, and the said Thweatt permitted his son, Robert, the member of a volunteer company, which was go-

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ing by the train from Columbus to Atlanta, on the 14th of August, 1861, to offer itself to Governor Brown for service in the war at that time existing, to take said Floyd with him on said train as his servant, then the defendant is not liable."

2d. Because the Court refused to charge the jury as follows: "That if Floyd belonged to Owen Thomas, and he had given to M. W. Thweatt permission to use and control Floyd as his own property, yet this was not a permission to put Floyd to any illegal use, and, although Thweatt might have put Floyd to an illegal use, still the defendant was liable, unless it was shown that Thomas knew that Thweatt was putting Floyd to such use, and consented to his doing so." The Court refused to give this request in charge, but said, "that, as a general rule, when one allows another the use of his property, the law implies it to be a lawful use only, but if the jury believes that this negro ever belonged to M. W. Thweatt and was sold at sheriff's sale and bought by Owen Thomas, and Thomas allowed the negro to remain in the possession of Thweatt, and allowed Thweatt to use and control him as his own, then the defendant is not liable."

The motion was overruled, and the plaintiff excepted upon each of the grounds aforesaid.

H. L. BENNING; M. H. BLANDFORD, for plaintiff in error.

1st. The maxim *in pari delicto, potior est conditio defendentis*, does not apply: Broom's Leg. Max., 325, 326, 327, 328; Holman vs. Johnson, Cowp., 343. "It is a *presumptio juris*, running through the whole law of England, that no person shall, in the absence of criminative proof, be supposed to have committed any violation of criminal law, whether *malum in se*, or *malum prohibitum*, or even done any act involving a civil penalty:" Best on Presumptions, see 53, 58; Williams vs. E. India Co., 3 East, 192; Rodwell vs. Redge, 1 Carr. and P., 220 (11 Eng. C. L.); Ross vs. Hunter, 4 T. R., 33, 38; Printup vs. Johnson, 19 Ga., 75; Long vs. Lewis, 16 Ga., 162; Pool and wife vs. Morris et al., 29 Ga., 384; Shropshire & Hawkins vs. Stephenson, 17 Ga., 623. *In facto quod habet*

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se in bonum et malum magis de bono quam de malo lex intendet. Coke, on Litt., 78 (*b*;) 10 Coke, 56 (*a*;) 1 Stark Ev., 686, (cited in Best on Prin. of Ev., sec. 295.)

2d. Giving aid to the Confederate States in the war, if wrong, was a criminal act—treason. Cons. U. S., (Irwin's Code, sec. 5041.) Therefore, it shall not be presumed to have been given in the absence of criminative proof.

3d. The buyers leaving the bought property in the possession of the seller, is a badge of fraud as against creditors and them only. The railroad was no creditor of Thweatt, the defendant in the *fi. fa.* under which Thomas bought the slave. Thweatt's possession, therefore, was no evidence against the validity of Thomas' title.

4th. The *delictum* in this case was the wrongful killing of the slave. The *delictum* of giving aid to the war, *if it was a delictum*, was another and distinct *delictum*. In the latter, both parties may have been participants; in the former, the plaintiff had no part whatever. But to render the maxim applicable, the plaintiff ought to have had equal part in it: Holman *vs.* Johnson, Cowp., 343; Broom's Leg. Max., 325, 326, 327, 328.

5th. The maxim, if it ever applied to physical injuries, has been repealed as to them. "A physical injury done to another gives a right of action, whatever may be the intention of the actor, unless he is justified under some rule of law:" Irwin's Code, sec. 2917. So does any violent injury: Code, secs. 2917, 2920, 3020, 3021. Especially is this true of injuries done by railroads: Irwin's Code, secs. 2979, 2980. But neither the owner nor the railroad company, was guilty of any *delictum*. If of any, it could only have been of treason against the United States. "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open Court:" Const. U. S., (Code, sec. 5041.) Neither of the parties was levying war against the United States, or was adhering to their enemies,

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giving them aid and comfort. There was no proof by any witness of any overt act done. Much less was there proof by two witnesses of the same overt act, nor was there any confession in open Court. These two definitions of treason were taken from the Statute of Treasons of the 25th Edward III: Institutes, 6 vol. 1, 2. That statute, according to Coke, divides treason into six classes: 6 Inst., 1, 2, 3; according to Blackstone, into seven: 3 Black., 54, 60. Of these, the Constitution of the United States adopted only the third and fourth: 3 Black., 82, 83. Therefore, the words in the Constitution must be taken to have the same meaning which they had in the statute.

6th. Levying war in that statute means levying war *in fact*. "A compassing or conspiracy to levy war is no treason, for there must be a levying of war *in fact*:" 6 Inst., 9, 14; 3 Black., 81-2; 1 Hale P. C., 130-1. In the present case, there was no levying of war *in fact*: see evidence. Treason against the State "shall consist in levying war against the State," etc.: Irwin's Code, secs. 4246-7-8. Here, if there was any levying of war, it was *for*, not *against*, the State.

7th. *Enemies*, in the statute, means foreign enemies. "*Inimicus*, in legal understanding, is *hostis* for the subjects of the king, though they be in open war or rebellion against the king, yet are they not the king's enemies, but traitors; for enemies be those that be out of the allegiance of the king:" 6 Inst., 11. Even pirates are not traitors, though they make war on the whole human race: 6 Inst., 113; 1 Hale P. C., 164; East. Cr. Law.; Const. U. S., Art. I., sec. 8, clause 9. They are felons, "adhering to their enemies, giving them aid and comfort." To constitute this, there must be some actual assistance, some overt act; a willingness to assist is not sufficient: 6 Inst., 10, 11; Hale's P. C., 159, 170, and note; 6 Hawk. P. C., chap. 17, sec. 28. In the present case, the willingness of the companies to assist was, itself, only on condition, namely, that the Governor of Georgia should accept their services. But as to Owen Thomas, himself the owner of the slave, there is no evidence at all that he was a member

of any company, or that he knew that one of the company was carrying the slave to the war as a servant, much less that he consented to it. Whereas, there ought to have been the evidence of two witnesses to it, or his own confession in open Court. The propositions that a State cannot commit treason, and that its citizens are bound to obey its regular enactments and the orders of its constituted authorities, and, therefore, in obeying them, are not guilty of treason, we shall not discuss, because we think that we have enough in the case without them. We may remark, however, that the action of the government authorizes the inference that it did not consider the soldiers engaged in the war against it to be traitors. It treated them as belligerents, and gave them all the rights of war. Not one was tried for treason. The punishment fell upon the States as States—emancipation, prohibition of the payment of the war debt, superseding the State governments by military provisional governments. Some citizens, it is true, were laid under disabilities to hold office, but this could only be done by an *ex post facto* amendment of the Constitution.

8th. The cases of Wallace vs. Cannon, 38 Georgia, 199, and Martin vs. Wallace, 40 Georgia, 493, are distinguishable from this: 1. Martin was actually engaged in "levying war against the United States;" Cannon was adhering to their enemies, giving them aid and comfort. But Thomas was not even in service; was not shown to have even knowledge that his slave was going as servant of one of the members of a company. The company itself was not in service; only about to offer itself for service. No overt act done. 2. The claim for damages was put on the ground that the men killed were not guilty of *any delictum*, but were merely in the discharge of a duty they owed their State. Their argument admitted in effect, that if not thus justifiable they were in *pari delicto*. Here we argue that the owner of the slave killed might have been acting illegally, yet he was not in *pari delicto*, that there were two *delictums*; one, being engaged in the war; the other, the killing of a person engaged in the war, and that in the latter, Thomas had no part. 3. We read the Code which repeals

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the maxim *in pari delicto*, as to physical injuries, especially if done by railroads *supra*. 4. The case ought to be distinguished from those cases: Ram. on Leg. Judg't, 134, 138, (Law Lib.)

R. J. MOSES; L. T. DOWNING, for defendant. The maxim *in pari delicto*, etc., prevents a recovery in this case: 38 Ga. R., 199; 40 *Ibid.*, 52. The fact that Floyd was accompanying Robert Thweatt as a servant was an act of treason: Greenleaf's Ev., 242 *et seq*; 4 Cranch., 125; *Ibid.*, 498.

McCAY, Judge.

1. Whatever may have been the truth as to the real ownership of this slave, the conduct of Mr. Thomas in permitting Thweatt to "use him as his own," justifies persons without notice of the truth, in recognizing Thweatt as the owner. We do not think, therefore, that the railroad company was guilty of a conversion in taking the boy away from Columbus under Thweatt's consent or directions.

2. On the general question argued here, and decided by the Judge below, we think the Judge was right. If the war with the United States was illegal, the men who, in an organized capacity, started from Columbus at the expense of the Confederate authorities or at the expense of the State organization, then a part of the Confederate organization, were engaged in an unlawful act; we see no difference between going as accepted volunteers, and going with intent to volunteer.

3. But we think the men and this negro, or the owner of this negro, stand on a different footing. The plea of the company is: You cannot recover, because both of us were engaged in an illegal undertaking, and the law will not interfere to punish me for the *neglect* of my servants in the course of the prosecution of this undertaking. The plaintiff replies: As to this boy, the undertaking on *your part* to carry him, was no part of the illegal undertaking. You refused to take him *as a soldier* or as part of the baggage or accompaniments of the company. You demanded and received pay for him as an

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ordinary passenger, without any reference to the purpose in which we were engaged and in which you participated. You, by your own words and acts at the time, specially repudiated any implication with me in carrying this boy, and you cannot now deny the grounds on which you got my money. True, the soldier who took this boy along was intending to make use of him, in the performance of his design to carry on war. But the railroad company did not participate in that purpose, but expressly repudiated it.

It is not because the men were engaged in an illegal act, that the defense of the railroad exists. It is because of the participation of the railroad company in that illegal act. This participation brings them within the rule—often an arbitrary and sometimes an unjust rule—that the Courts will not interfere to settle the disputes and litigation growing out of this *mutual* illegality. As we have said, however, there is evidence here to justify the conclusion that this negro was carried under the express stipulation of the employees of the road as an ordinary passenger, not at all connected with the illegal enterprise, and the jury should have had that view of the law before them. The charge of the Judge, as given, excluded any consideration of that evidence, and a new trial should be granted on that ground.

Judgment reversed.

SAMUEL M. MAY, plaintiff in error, vs. THE MEMPHIS
BRANCH RAILROAD COMPANY, defendant in error.

1. A member of a chartered company may, by his acquiescence or presumed assent, become bound by the acts of his company, and thereby be disabled from setting them up as a defense, when he could have so set them up were it not for such presumed ratification. (R.)
2. The original contract between the stockholders of a railroad company, as contained in the charter, cannot be materially or essentially altered by an amended charter, so as to bind the subscribers thereto without their consent. (R.)

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Railroads. Charter. Stockholders. Waiver. Before Judge HARVEY. Floyd Superior Court. July Adjourned Term, 1872.

For the facts of this case, see the decision.

W. B. TERHUNE; PRINTUP & FOUCHE; WRIGHT & FEATHERSTON, for plaintiff in error.

SMITH & BRANHAM; UNDERWOOD & ROWELL; DUNLAP SCOTT, for defendant.

TRIPPE, Judge.

The Memphis Branch Railroad Company brought suit against S. M. May for three installments of \$100 00, which had been assessed on his subscription to the capital stock of the company. The defendant, amongst other defenses, pleaded :

1. That when his subscription was made, the charter of the company, approved October 10th, 1868, declared that the capital stock of said company shall be \$500,000 00, in shares of \$100 00 each, and that since his subscription was made, the company had procured the passage of an Act, approved December 4th, 1871, amending the charter, which was injurious to him, to-wit: an amendment authorizing said company to commence work on said road whenever \$100,000 00 shall have been subscribed.

2. That, after he had made his subscription, Alfred Shorter subscribed for \$250,000 00 of said stock. That, at a called meeting of the stockholders, on March 20th, 1871, it was consented that the said Shorter might surrender said stock to the company, on the ground that the subscription was understood to be only nominal when made, and was made for the protection and benefit of the company, and that he was, at an annual meeting of the stockholders on the 1st September, 1871, allowed to make a relinquishment of said stock to the company, and that the release of Shorter was a release of defendant.

3. That said company had never been legally organized,

because the law requires that the annual meeting of the stockholders to elect a board of directors shall be held on the first Monday in May in each year, which was not done, the first board being elected on the 25th May, 1869, the second on the 21st May, 1870, the third on 1st September, 1871, the fourth on 6th May, 1872.

4. That the board of directors had commenced the construction of said road on a capital of \$150,000 00, which amount was insufficient to build it to a point that would make it profitable to the stockholders.

5. That when he subscribed, it was understood and believed that said road, when constructed, was to be the broad or common gauge, whereas, the board of directors are proceeding to construct a narrow gauge road.

The suit was instituted in the Justice's Court, in October, 1872, and, by consent, appealed to the Superior Court and tried in November, 1872. The whole question of fact and law was, by agreement of the parties, submitted to the Judge, and judgment rendered in favor of the company for the amount of the assessment. Error is assigned on the ground that the Court overruled and gave judgment against each of said pleas.

The record shows that the facts recited in the pleas were true, with the modifications hereafter stated ; also, that the first installment was assessed, and was due June 15th, 1870 ; that defendant had paid three installments of five per cent. each ; that the twenty-five hundred shares subscribed by Shorter, and from which he was released, were subscribed " long after defendant had subscribed and paid a part of his installments ; " that, besides Shorter's subscription, a little less than \$150,000 of stock has been taken ; that the company commenced the prosecution of their enterprise on the 15th of June, 1870 ; that a bridge, costing \$15,000 00, has been built ; that between \$40,000 00 and \$50,000 00 have been expended, and the road graded to within four miles of the Alabama line, the terminus, by the charter, unless the road unite or consolidate with some other road, as, by its charter, it is allowed to do.

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All this had been done by November, 1872. It does not appear from the evidence when defendant first objected to or dissented from any of the acts of the corporation now complained of by him. Suit for three installments was commenced in October, 1872. It may be reasonably inferred that he made his dissent some time previous to that date—say when the first of the three installments for which he was in default was assessed. When that was, does not appear.

Here, then, was a railroad company, whose charter is that “the capital stock shall be \$500,000 00.” No amount of subscription is prescribed as a condition precedent to an organization or the commencement of the work. The company organizes and commences the prosecution of the enterprise with a subscription of stock to the amount of about \$150,000 00. That amount has never been as much as \$500,000 00, even with the nominal subscription made by Shorter. Eighteen months after the payment of the first installment, and several months after Shorter had been permitted to cancel his subscription, an amendment to the charter was obtained, authorizing, amongst other things, the company to organize and commence work, when \$100,000 00 of stock was subscribed, and legalizing all previous elections of boards of directors, and all the acts of the company theretofore done. Within five months from the passage of this Act, and at the first annual meeting thereafter of the stockholders, regularly called with due notice, wherein more than three-fourths of the stock was represented, it was unanimously agreed to accept the amended charter.

It does not appear how much work had been done before this. One installment, at least of five per cent., had been assessed and paid. If the other two had been paid, then fifteen per cent. on \$150,000 00 had been assessed and collected, and it is to be presumed appropriated towards the prosecution of the enterprise. If the company had thus organized and commenced work with \$150,000 00, and expended fifteen per cent., no corporator thus contributing could repudiate the organization, or the obligations resulting from what had been done.

Instead of complaining that an amendment had been procured and accepted, allowing work to be commenced with \$100,000 00, which had already been commenced with \$150,000 00, it was only an Act legalizing that whereby he was already bound. Practically, such legislation and acceptance was surplusage as between the corporators who had thus contributed, and could only serve to protect the company against any complaint that might have been made by the State or third parties, that its action had been *ultra vires*, even, indeed, if that could have been done.

If the other two installments were not paid until after this acceptance of the amended charter, he would then be presumed thereby to have given his assent and ratification to the action of his company in thus accepting. It is worthy of remark that the defendant, who was examined as a witness, says that "due and legal notice was given of the several meetings of the stockholders." These meetings were four in number. He does not deny having attended those of May 25th, 1869, when the first board of directors was chosen, and of May 21st, 1871, when the second was chosen, and only denies his being present at the meeting of March 20th, 1871, when it was agreed that Shorter might be released from his subscription. He does not say that he even dissented from any action of the company, or of either of the boards of directors, or that he dissented, at any time, from any of the various acts which he now sets up as sufficient to discharge him from all liability on account of his subscription.

It is not doing violence to common sense or reason to presume, from all this, not only that there was no dissent, but, also, the fair and reasonable inference is that a member of an incorporated company thus acting, and who must have known all that had been done, did, in fact, ratify and assent to the same, and we doubt not the Judge who gave judgment did so find. A few authorities, only, are necessary to show that a member of a chartered company may, by his acquiescence or presumed assent, become bound by the acts of his company, and thereby be disabled from setting them up as a defense,

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when he could have so set them up were it not for such presumed ratification.

In 16 Sergeant and Rawle, 140, where a subscriber was sued on his subscription for stock, it was held that where a fraud had been committed on a subscriber by means of fictitious subscriptions, no action could be maintained against him for his subscription. "But where such subscriber has accepted the charter, and, by his own act put it in operation, he cannot avail himself of the fact that part of the stock was fictitious." Subscribers who permitted work to be carried on without objection, held as assenting: Wright, 752. If a corporator acted or voted as such after change of charter, he is bound by the change: 48 Penn. St. R., 29; 10 Watts, 364.

Many other decisions might be given sustaining the same points, and it is true that there are some in conflict with them; but scarcely any can be found that go so far as to hold that a subscriber may give his assent and act upon it, and his company with him, and then repudiate what he had before agreed to, and claim that he is discharged from his subscription by reason thereof. This would be in conflict with that principle which is the foundation of all liability, either in matters arising *ex contractu* or *ex delicto*, to-wit: that every one is liable for what he does by himself, or by any one for him, which he assents to or ratifies. Neither in law or morals is one allowed to blow hot and then cold. A gift once, is a gift forever. A contract, when made, cannot be departed from without the consent of all parties thereto. The law often implies a contract. The assent of a party to a contract may be, and is often, implied or presumed. It may be proven by circumstances, like all things else in law, and we, in this decision, only assert a doctrine, as old as the common law—the doctrine of circumstantial evidence.

We do not intend to do any violence to any right a corporator has under the charter of his company—what a great English writer calls "the proprietary contract." Great abuses have been committed by a misinterpretation of such charters. The writer above referred to says, with much force: "The

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general principle underlying the right government of every incorporated body is, that its members contract with each other, severally, to submit to the will of the majority in all matters concerning the fulfillment of the objects for which they are incorporated, but in no others. To this extent only can the contract hold:" Spencer's Essays, Railway Morals and Railway Policy, 292.

This Court, in *Winter vs. The Muscogee Railroad Company*, 11 Georgia, 438, in an opinion pronounced by the present Chief Justice, held, "that a material and essential alteration of the original contract would release the defendant from his stock subscription, unless his assent to such alteration could be shown." And further, in the same case: "The original contract of the parties cannot be materially or essentially altered by an amended charter so as to bind the subscribers thereto, without their consent."

We recognize these principles. They distinctly imply that in such cases, if the subscriber does assent to what is done, he is bound. We only hold herein that this assent may be proven in such cases, like it may be in all others—by circumstances, by acts, by acquiescence.

We conclude, then, that such continued acquiescence in, and such acts so strongly indicating defendant's assent to the actings of the company, now complained of, disable him from repudiating the obligation incurred by his subscription; and this, especially, applies to the points raised in the pleas, as to the elections of the boards of directors—the assessments being made and the work being commenced before \$500,000 00, the whole of the capital stock, was subscribed, and the release of Shorter from his subscription. There were none of these acts but what were accomplished, or publicly declared and entered of record on the minutes of the company from eighteen months to two years before defendant made any complaint, so far as the record discloses. The resolution allowing Shorter to cancel his subscription was passed on the 20th of March, 1871, at a meeting of stockholders, duly called and published, with the announcement that that question would be one of the mat-

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ters for consideration, and the resolution recites that the company understood the subscription to be nominal when it was made. The other point raised by the plea of a change being made from the broad gauge to the narrow gauge may be said to be covered by the same principle. The resolution of the stockholders giving the directors the discretion to use either gauge, was passed unanimously on the 1st of September, 1871, more than a year before any dissent, so far as can be ascertained from the record, was made known by the defendant. The only evidence as to what was to be the gauge of the road when the subscription was made, is by the defendant; "that he supposed, when he subscribed, the road was to be built the common gauge." If the charter had prescribed the gauge, or if the subscription had been made on the express condition of a certain gauge, a subscriber who would act within a reasonable time after a violation of that condition, could be heard either in a proceeding instituted by him to arrest such violation, or in one against him to enforce his subscription. But nothing appears to show there was any such condition or contract in this case as to make it binding on the corporation.

Let the judgment of the Court below be affirmed.

JOHN R. JOHNSON, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

1. Excitement in the public mind, and excited public feeling in the county in which a crime has been committed, is not alone sufficient to authorize the continuance of a case. (R.)
2. Where a defendant is on trial for an offense for which he will be punished by death, unless the jury shall otherwise recommend, it was not error in the Court to allow a juror to be set aside by the State for cause, upon the statement that he was conscientiously opposed to capital punishment. (R.)
3. It is not competent to show by a witness, for the purpose of degrading and impeaching him, that he had, during the term of the Court then in session, pleaded guilty to a criminal offense. The record of the plea of guilty was the highest and best evidence. (R.)

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4. Where a defendant is on trial for the offense of arson, the finding of goods stolen from the burnt house in his possession, though not proof of the crime charged, yet it is a circumstance, connected with other evidence, which the jury may consider in making up their verdict. (R.)
5. Where a man, or a man and his family, or a woman, or a woman and her family, are living in a dwelling house, and have their household effects, or valuable articles in such dwelling house, and are temporarily absent at church, or on a visit to a neighbor, or on business, and the dwelling house is burnt during such temporary absence, it is the burning of an occupied dwelling house, within the meaning of the statute, although no one was in the dwelling house at the time it was burnt. (R.)
6. The verdict, under the law, if they did not intend that the punishment of death should be commuted, should have been a verdict of guilty generally. If the jury did intend, by their verdict, that the penalty of death should be commuted to imprisonment for life in the penitentiary, then, under the law, they should have so recommended. The recommendation of the prisoner to the mercy of the Court did not authorize the Court, under the law, to commute the penalty of death. The verdict, therefore, under the law applicable to this class of cases, in which the penalty of death may be commuted, was an illegal verdict, and should be set aside. (R.)

Criminal law. Continuance. Juror. Challenge. Witness. Evidence. Arson. Occupied dwelling house. Verdict. Commutation. Recommendation to mercy. Before Judge COLE. Bibb Superior Court. April Adjourned Term, 1872.

For the facts of this case, see the decision.

R. W. JEMISON; R. W. STUBBS, by brief, for plaintiff in error.

E. W. CROCKER, Solicitor General; JOHN B. WEEMS, by Z. D. HARRISON, for the State.

WARNER, Chief Justice.

The defendant was indicted for the offense of arson, and charged with burning an occupied dwelling house, the same not being in a city, town or village. On the trial of the defendant, the jury found a verdict of guilty and recommended

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him to the mercy of the Court. A motion was made for a new trial, on the several grounds set forth in the record, which the Court overruled, and the defendant excepted. There was no error in overruling the motion for a continuance of the case.

1. Excitement in the public mind, and excited public feeling in the county in which a crime has been committed, is not alone sufficient to authorize a continuance of a case, the more especially since the Constitution authorizes a change of venue for the trial, when the presiding Judge is satisfied that an impartial jury cannot be obtained in the county where the crime was committed.

2. There was no error by the Court in allowing Menard, the juror, to be set aside by the State for cause, when he stated, on oath, that he was conscientiously opposed to capital punishment. The defendant might be punished with death for the offense charged in the indictment, unless the jury, by their verdict, should recommend otherwise, under the provisions of the Code.

3. There was no error in the refusal of the Court to compel the witness, Day, to answer whether he had not, during the present term of the Court, pleaded guilty to the charge of simple larceny, larceny from the house, burglary and arson, for the purpose of degrading and impeaching the witness; the record of his plea of guilty to such charges was the highest and best evidence of the facts.

4. Nor do we find any error in the refusal of the Court to charge the jury as requested, or in the charge as given, "that the finding of goods stolen from the burnt house in the possession of the prisoner, would not be proof of arson, still, it is a circumstance, connected with other evidence, which you may consider in making up your verdict."

5. There was no error in the charge of the Court to the jury in relation to the dwelling house being occupied, in view of the evidence in the record. The witness Russell states that he occupied the house, left it in the morning, returned same evening, and found the house burnt down; his wife left the

house the same day, left his goods and some money in the house; there was no one in the house at the time it was burnt. Where a man, or a man and his family, or a woman, or a woman and her family, are living in a dwelling house, and have their household effects, or valuable articles in such dwelling house, and are temporarily absent at church, or on a visit to a neighbor, or on business, and the dwelling house is burnt during such temporary absence, it is the burning of an occupied dwelling house within the meaning of the statute, although no one was in the dwelling house at the time it was burnt. The object of the statute is to protect the home of the occupants of a dwelling house and their property therein, from the torch of the incendiary, and it is none the less their home, their dwelling house, because temporarily absent therefrom.

6. In the case of *Stallings vs. The State*, 47th Georgia Reports, 572, this Court held that it was the duty of the Court below to have charged the jury, where a defendant was indicted for arson, under the 4311th section of the Code, that they could, by their verdict, if they saw proper to do so, recommend that the defendant be punished by imprisonment in the penitentiary for life, and if they had so recommended, then it would have been the duty of the Court to have commuted the penalty of death, in accordance with such recommendation. The charge of the Court to the jury in this case, is not fully set forth in the record, but we are bound to presume that the Court charged the law correctly in relation to that point in the case, and if it did, the verdict is an illegal verdict. If the jury intended by recommending the prisoner to the mercy of the Court in their verdict, that the penalty of death should be commuted to imprisonment for life in the penitentiary, then their verdict is not a legal verdict for that purpose, and the Court cannot commute the punishment under it. The verdict, under the law, if they did not intend the punishment of death should be commuted, should have been a verdict of guilty generally. If the jury did intend, by their verdict, that the penalty of death should be commuted to imprisonment for life in the penitentiary, then, under the law,

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they should have so recommended. The recommendation of the prisoner to the mercy of the Court did not authorize the Court, under the law, to commute the penalty of death. The verdict, therefore, under the law applicable to this class of cases, in which the penalty of death may be commuted, was an illegal verdict, and should be set aside.

Let the judgment of the Court below be reversed, and a new trial ordered.

NATHANIEL J. BUSSEY, plaintiff in error, vs. RAPHAEL J. MOSES, defendant in error.

Where there has been a jury trial and a verdict, and the evidence is conflicting, it is for the jury to determine upon the credit to be given to the witnesses, and if the Judge below, in the exercise of his legal discretion, refuses a new trial, there is no legal ground for the interference of this Court to grant a new trial.

New trial. Before Judge JOHNSON. Muscogee Superior Court. October Term, 1872.

Raphael J. Moses brought complaint against Nathaniel J. Bussey for \$270 00, with interest from June 1st, 1871. He alleged, in his declaration, that on January 1st, 1869, the defendant being the holder of \$2,600 00 of bills of the Bank of Columbus, and being a stockholder in said bank, and it being doubtful, from this fact, whether he could secure any dividend on said bills, authorized the plaintiff to make a compromise with the bill-holders who were not stockholders, some of whom had brought suit on their bills, and undertook and promised to the plaintiff that if he would undertake to have all suits pending against said bank or against said defendant, as a stockholder, dismissed, that he would allow to the plaintiff, as compensation for his services, one-half of whatsoever sum he, the said defendant, might secure as a dividend on said bills. That the plaintiff did so undertake, and was successful

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in achieving the result desired, by which said defendant secured the sum of \$520 00 on said bills, yet the said defendant has refused to pay to plaintiff the compensation promised, as herein set forth.

The declaration was subsequently amended by the addition of a *quantum meruit* count.

The defendant pleaded the general issue.

The plaintiff introduced the following testimony:

Raphael J. Moses, the plaintiff, sworn: Plaintiff filed a bill for D. F. Wilcox, assignee of the Bank of Columbus, against the creditors and stockholders of said bank, asking direction of the Court in the distribution of the assets. A decree was rendered in the Superior Court of Muscogee county, under which the stockholders who held bills were allowed to receive a dividend just as other bill-holders. This decree was affirmed on exceptions taken, in this particular, in the Supreme Court. Several suits for large amounts were brought by Peabody & Brannon, as attorneys against the stockholders, one of the suits being for \$30,000 00. These suits were pending when the decree was made on the bill for direction. Plaintiff determined to effect a compromise with the bill-holders, but before doing this he made contracts with enough of the stockholders to pay him for his labor. The defendant had been a stockholder for fifty shares, and had sold his stock in 1859 or 1860, but had not advertised the fact, as required by the law, in order to relieve himself from liability. The amount of bills in circulation at the time was sufficient to make each stockholder liable for \$160 00 on each share of stock, and as defendant held fifty shares of stock, his liability was \$8,000 00. Plaintiff met defendant at Spear's corner, in Columbus, and told him what he, plaintiff, intended doing, and defendant told him to go ahead, and he would do what the other stockholders did; saw him at another time standing on the steps of the old Bank of Columbus building, and then said he would give to the plaintiff one-half of what he received on the bills; saw him at another time at the Eagle and Phoenix Factory, when a storm was raging. Mr. Young and the plaintiff were sit-

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ting on a bench under a shed, in the rear of the office. Defendant came up and asked plaintiff how the case was progressing. He said, as he left, that they were to divide what plaintiff recovered on the bills. Plaintiff made arrangements with several of the stockholders, and when he had secured enough to compensate himself, he proceeded to effect the desired compromise. Plaintiff did effect a settlement, but it was after much trouble and expense; had to pay Mr. Dougherty thirty-three cents in the dollar on the bills he held to secure his consent; had to pay fifty cents on the dollar to Mr. Russell to secure the same end. By the compromise decree plaintiff obtained, defendant received \$520 00 on his bills. He refused to pay plaintiff for his services. Some of the stockholders paid plaintiff ten cents, and some twelve cents on the dollar, of their bills; made no contract with Captain McAllister, as plaintiff knew him to be a fair man, and would do what was right; knew that he would not take advantage of plaintiff's labor, and refuse to pay for it; charged him five per cent. of his bills, which he paid without complaint. But plaintiff was not willing to trust the defendant, as he believed defendant would take advantage of his labors, and refuse to pay anything after the compromise was effected. After the defendant had received the money on his bills, plaintiff had occasion to go down to the factory to see Mr. Young, and there saw the defendant. He then denied that he had ever made any contract with the plaintiff. Mr. Young did not remember the conversation, although he remembered the occasion of the storm, and plaintiff's being at the factory. Mr. Young is hard of hearing, and may not have heard the conversation between the plaintiff and the defendant.

Plaintiff introduced testimony to show that his services to defendant were reasonably worth \$500 00; to show the character of the litigation between the bill-holders and the stockholders of the bank, and the consent decree that was rendered. It further appeared that the defendant had only \$2,500 00 in bills, and, therefore, received \$500 00.

The defendant denied that he had ever, under any circum-

stances, made any contract with plaintiff in reference to his said bills, or that he had ever had any conversation with him on the subject.

W. H. Young testified that he remembered one occasion when the plaintiff was at the factory, during a storm; that plaintiff and the defendant were talking before he came up; that he did not hear anything said about the employment of plaintiff by the defendant, or about defendant's giving to him one-half of the bills; that plaintiff and defendant had no conversation in his presence, that he remembered, which he did not hear.

The defendant also introduced the record of the bill of D. F. Willcox, assignee, to show that he was not a party to the same; also, evidence to show that he never was sued as a stockholder of the Bank of Columbus.

The jury returned a verdict for the plaintiff for \$250 00; whereupon, the defendant moved for a new trial, upon the ground that the verdict was contrary to the evidence. The motion was overruled, and the defendant excepted.

PEABODY & BRANNON, for plaintiff in error.

M. H. BLANDFORD; R. J. MOSES, for defendant.

McCAY, Judge.

It would be a violation of the oft repeated rulings of this Court to reverse the judgment of the Judge of the Superior Court in this case. To a stranger, who does not know the witnesses, the testimony is pretty fairly balanced. And, under the mode of trial provided by law, the proper tribunal for deciding as to the credibility of the witnesses has passed upon it, and we have no power to alter the verdict.

It seems almost absurd to say that the verdict of the jury is without evidence. Whether the verdict ought to be one way or the other, seems to turn entirely upon the weight given by the jury to the principal witnesses. Their statements are contradictory. Both of them are interested in the

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event of the suit; both, indeed, are parties to the suit. If the verdict of a jury is to be set aside because the Court differs from the jury on the credit to be given to the witnesses, and this, too, when the witnesses are parties, we see no use for a jury trial at all. There must be, somewhere, an end to controversy. Our law has provided that, on questions of fact, that end is the verdict of a jury. True, if the jury bring in a verdict displaying that it is not based upon facts and testimony, the Judge of the Superior Court may set it aside; but for a mere difference of opinion as to the credit to be given to this man or that man, the Judge ought not to interfere. Especially is this true if the witnesses be neither of them attacked, and the weight to be given to each is to depend on the mode of testifying and the probability of the account given by each of the transaction. For a difference of opinion between the Judge and the jury in such a case, it is not in the power of the Court to interfere.

To make out a case for our jurisdiction, the jury must not only have acted with passion, under a mistake of law, or clear mistake of fact, but the Judge must, himself, have acted with want of discretion.

Judgment affirmed.

R. J. MASSEY, trustee, plaintiff in error, vs. PITTS, COOK & COMPANY, defendants in error.

The brief of evidence, when brought up as a part of the record, though the bill of exceptions, certified to by the Judge, contains the assertion that it was agreed upon by counsel, must nevertheless, show that it was approved by the Court. (R.)

Practice in the Supreme Court. Brief of evidence. Before the Supreme Court of Georgia. January Term, 1873.

When this case was called, counsel for defendants moved to dismiss the writ of error, on the ground that neither the bill

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of exceptions nor the record showed that the evidence had been approved by the Court.

The bill of exceptions recited, that "the case of Pitts, Cook & Company against Robert J. Massey, trustee for wife and children, being an action of assumpsit, came on to be heard before the Honorable John L. Hopkins, one of the Judges of the Superior Courts of said State, presiding in said Court, and a jury impaneled to try said case. The plaintiff introduced certain evidence which was agreed upon and filed according to law, on the motion for a new trial, and by law, made a part of the record in the case, to which leave of reference is hereby prayed as often as may be necessary in the consideration of said cause." The certificate to the bill of exceptions was in the usual form. The brief of evidence, as contained in the record, had no agreement thereon, or approval by the Court.

The motion was sustained and the case dismissed.

A. W. HAMMOND & SON, for the motion.

J. T. PENDLETON, *contra.*

JOHN CLARK, plaintiff in error, vs. MARTHA A. LYON *et al.*, defendants in error.

1. Service of the bill of exceptions by counsel for plaintiff in error, by mailing the same addressed to the attorneys of defendants, is insufficient. (R.)
2. Where service of the bill of exceptions is perfected by counsel for plaintiff in error, such service must be authenticated by an affidavit made by such attorney at the time of the service, and attached to the bill of exceptions. (R.)

Motion to dismiss writ of error. Practice in Supreme Court. Service. Before the Supreme Court. January Term, 1873.

Meador vs. Dent *et al.*

When the above case was called, counsel for defendants in error moved to dismiss the writ of error, upon the ground that the bill of exceptions had not been served as required by law. The only evidence of service was the following entry:

“GEORGIA—HENRY COUNTY.

“I have this day served a copy of this bill of exceptions on Messrs. Doyal & Nunnally, attorneys for defendants in error, by forwarding the same to them by due course of mail, addressed to them at Griffin, Georgia. This November 29th, 1872.

(Signed)

“S. C. McDANIEL,

“Attorney for plaintiff in error.”

Counsel for plaintiff in error stated that Mr. Doyal, of the firm of Doyal & Nunnally, had admitted that he received the copy of the bill of exceptions forwarded. Upon this basis he moved to amend the entry by stating absolutely that counsel for defendants in error had been served. The Court refused to allow the amendment, and dismissed the writ of error.

SPEER & STEWART; DOYAL & NUNNALLY, for the motion.

S. C. McDANIEL; J. J. FLOYD, *contra*.

JOHN T. MEADOR, administrator, plaintiff in error, vs.
JOSEPH E. DENT *et al.*, defendants in error.

There having been no service of the bill of exceptions, as required by law, the written waiver of such service, after the case has been reached in the Supreme Court, cannot give said Court jurisdiction of the same.
(R.)

Practice in the Supreme Court. Jurisdiction. Waiver. Bill of exceptions. Before the Supreme Court. January Term, 1873.

When the above stated case was called in the Supreme Court, it appeared that the bill of exceptions had reached this Court without any service having been made upon the defendants in error; that counsel for plaintiff in error then secured the written waiver of each of the defendants in error of such service, and their consent that the case be tried as if service had been regularly perfected. The Court held that it had no jurisdiction, and refused to hear the case.

WRIGHT & DENT, for plaintiff in error.

No appearance for defendants.

J. W. ARMSTRONG, administrator, *et al.*, plaintiffs in error, vs.
JOHN B. LEWIS, defendant in error.

Where an injunction was refused by the Chancellor, and the case, by writ of error, was carried to the Supreme Court and the judgment reversed, and defendants then moved before the Chancellor to dissolve the injunction, which motion was overruled, such decision cannot be carried by bill of exceptions to the Supreme Court, within ten days, under the Act of October 28th, 1870. (R.)

Injunction. Practice in the Supreme Court. Before the Supreme Court. January Term, 1873.

When this case was called, counsel for defendants moved to dismiss the writ of error, upon the ground that the bill of exceptions showed the following facts: That on August 27th, 1872, the Chancellor had refused an injunction on the bill presented to him by complainant; that this decision was carried by writ of error, to the July term, 1872, of the Supreme Court, where it was reversed; that on March 1st, 1873, a motion was made to dissolve said injunction, and overruled by the Chancellor, to which decision a bill of exceptions was certified, on the 5th day of the same month; that this is the case now before the Court for consideration.

Lee vs. Clements.

Upon the statement by the Chief Justice that it was the unanimous opinion of the Court that the motion should be sustained, counsel for plaintiffs in error withdrew the record.

JOSEPH ARMSTRONG; VASON & DAVIS, for plaintiffs in error.

W. A. HAWKINS; POE, HALL & POE, for defendant.

SANDERS W. LEE, plaintiff in error, vs. T. M. CLEMENTS, defendant in error.

1. Where an agent and overseer sues his employer on an open account, for his services rendered as such, it is competent for the defendant to prove and to recoup the damages sustained by him in consequence of the failure of the plaintiff to enforce the provisions of the contract made by him as the agent of the defendant, with the freedmen. (R.)
2. When money, goods or supplies are furnished by the owner of a plantation to his agent and manager thereof, to be advanced to the freedmen in his employ, to be paid for at the end of the year out of their share of the crop, and the same has been received by such agent or manager, the burden of proof to show that he has made a proper application of such money, goods and supplies for the benefit of the owner, is upon him, but the more especially is it so when the agent and manager is specially instructed to keep a regular account of his receipts and disbursements, as in this case, otherwise the owner of the plantation cannot make a fair and just settlement with his laborers at the end of the year. (R.)
3. If the plaintiff failed and neglected, as the agent and manager of the defendant, to keep a regular account of his receipts and disbursements, when he was specially requested to do so, and in consequence thereof the defendant has been damaged by such negligence, then he is entitled to recoup such damages, and have the same deducted from the plaintiff's claim for his services as such agent and manager. (R.)

Principal and agent. Overseer. Damages. Recoupment. Evidence. Burden of proof. Before Judge HOPKINS. DeKalb Superior Court. March Term, 1872.

For the facts of this case, see the decision.

L. J. WINN; GARTRELL & STEPHENS; B. H. HILL & SON, for plaintiff in error.

HILL & CANDLER, for defendant.

WARNER, Chief Justice.

1. The plaintiff brought his action against the defendant on an open account for services rendered as an agent and overseer. The defendant pleaded that he was not indebted to the plaintiff anything, but that the plaintiff was indebted to him. There was a good deal of evidence introduced on the trial, and the evidence of the plaintiff and defendant was *distressingly* conflicting, as is generally the case when the parties to the suit testify in their own favor. The jury found a verdict for the plaintiff for the sum of \$2,213 90. A motion was made for a new trial on the several grounds set forth in the record, which was overruled, and the defendant excepted. The plaintiff claimed, in one of the items of his account, that the defendant was indebted to him the sum of \$1,221 00 for his services as agent in getting up thirty-seven whole hands, and superintending the same on his plantation for the year 1869. The written contract made between the defendant and the freedmen, by the plaintiff, as defendant's agent, specified that the defendant was to furnish the land, and the stock necessary to cultivate the same, and the freedmen to have one-half of the crop made. The defendant was to pay the freedmen a reasonable compensation for all rails split by them, but they were to haul the rails and make all necessary repairs of fences. The freedmen agreed to pay all advances made by Lee, either by money, clothing or provisions, from first proceeds of the crop, and to cultivate the same according to the directions of Lee, or his authorized agent, and to obey, promptly, all reasonable orders, either from said Lee or his authorized agent. On the trial of the case, the defendant offered to prove by the defendant and one Meadows, that the defendant had been damaged near \$1,000 00 in the year 1869, by reason of the

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failure of the plaintiff to enforce the contract made with the freedmen, by the defendant, as to the hauling of rails and repairing the fences on the plantation in charge of the plaintiff, which testimony was ruled out by the Court, and defendant excepted. It appears, from the evidence in the record, that in 1869, the defendant furnished the plaintiff with a book, and instructed him, as his agent and superintendent of his business on his plantation, to keep a regular account of the receipts and disbursements of all money, clothing, and provisions furnished for the freedmen in his employ, and for the use of the plantation; that money, clothing, provisions and other articles, were, from time to time, forwarded to the plaintiff, as his agent and superintendent as aforesaid, to be sold by him to the hands in his employ, or to be advanced to them. The plaintiff admits the receipt of most of the money, clothing, provisions, etc., but stated, on his examination as a witness, in general terms, that all had been applied for the benefit of the defendant. When the defendant went to his plantation in the latter part of the year 1869, to settle with the freedmen, he demanded of the plaintiff his book of accounts of his receipts and disbursements, so as to enable him to settle with them, but the plaintiff refused to produce it, whereby the defendant was greatly damaged in making said settlement, by reason of the plaintiff's failure and neglect to discharge his duty as his agent in that respect. The Court charged the jury, in relation to this point, "that in this case the burden of proof is on the defendant, to show that the goods and money alleged to have been entrusted to the plaintiff, by the defendant, to be disposed of for defendant's use, were not so disposed of—the presumption of law being that the goods and money were disposed of according to the directions of the defendant, without proof to the contrary. The defendant must first show, to your satisfaction, the loss of some part or portion of the articles or money alleged to have been entrusted to the plaintiff, or a conversion or appropriation of said articles, or a part thereof, by the plaintiff, to his own use, or the defendant cannot recover the value of said articles or money, or be allowed

the value thereof as a set-off, if any such articles and money is shown by the proof to have been so received by the plaintiff of the defendant." To which charge the defendant excepts, and assigns the same as error. In our judgment, it was error in ruling out the evidence of the defendant and Meadows, as to the damage sustained by defendant, by reason of the failure of the plaintiff to enforce the contract for repairing the fences on the plantation in 1869. It appears from the evidence in the record, that the fences on the plantation were out of repair, and for the purpose of having the same put in order, he made a very liberal contract with the freedmen as to their share of the crop to be made on the place. It was the duty of the plaintiff, as the agent and manager of the defendant's business, to have ordered the freedmen to split the rails necessary to repair the fences, the defendant paying them a reasonable compensation therefor, to have had the same hauled and the fences repaired, not only for the protection of the crop that year, but for the benefit of the plantation. The contract with the freedmen was that they were to obey, promptly, all reasonable orders of the defendant, or his authorized agent. If the plaintiff, as defendant's agent, had ordered the freedmen to repair the fences, and they had refused to do so, then the defendant would have had his remedy against them on their contract for the damages sustained by him in consequence of such refusal. By the neglect and failure of the plaintiff, as the defendant's agent, to give such orders to the freedmen for the repair of the fences under their contract, he is liable to the defendant for the damages sustained by him, resulting from such negligence, and the defendant may recoup the same, and have the proven amount thereof deducted from the amount claimed by him for his services in the suit instituted by him against the defendant therefor.

2. It was also error, in our judgment, for the Court to charge the jury, in view of the facts of this case, that the burden of proof was on the defendant to show that the goods and money were not disposed of according to the directions of the defendant, without proof to the contrary. The evi-

dence in the record is that the defendant resided in a distant county from that in which his plantation was located, that he had given *special* instructions to the plaintiff, as his agent and manager of his plantation, to keep a regular account of all receipts and disbursements, and furnished him with a book for that purpose; that money, clothing and provisions were sent to him from time to time, to be sold to and advanced to the freedmen in his employ. We are of the opinion, as a general rule, that where money, goods or supplies are forwarded by the owner of a plantation to his agent and manager thereof, to be advanced to the freedmen in his employ, to be paid for at the end of the year out of their share of the crop, and the same has been received by such agent and manager, the burden of proof to show that he has made a proper application of such money, goods and supplies for the benefit of the owner, is upon him, but the more especially is it so when the agent and manager is *specially* instructed to keep a regular account of his receipts and disbursements, as in this case, otherwise, the owner of the plantation cannot make a fair and just settlement with his laborers at the end of the year.

3. If the plaintiff in this case failed and neglected as the agent and manager of the defendant, to keep a regular account of his receipts and disbursements, when he was specially instructed to do so, and in consequence thereof the defendant has been damaged by such negligence, then he is entitled to recoup such damages and have the same deducted from the plaintiff's claim for his services as such agent and manager. Let the judgment of the Court below be reversed.

THE PRESIDENT AND COUNCILMEN OF THE TOWN OF DAWSON, plaintiff in error, vs. EDWARD KUTTNER, defendant in error.

Where the authorities of a town destroy a house to prevent the spread of a fire, and in so doing cause the destruction of personal effects in said house, which would not otherwise have been destroyed, the town is liable to the owner of the goods for the damages, even though the owner of the goods is only a tenant in the house. The verdict in this case is not illegal, as contrary to the testimony.

Eminent domain. New trial. Before Judge HARRELL. Terrell Superior Court. June Term, 1872.

Edward Kuttner brought case against the President and Councilmen of the town of Dawson, and alleged that defendant had injured him in the sum of \$1,190 00, in this: that on the night of February 22d, 1871, a fire broke out in the town of Dawson, at from seventy-five to one hundred yards from the store occupied by the plaintiff; that defendant, before it became necessary to arrest the progress of the flames, by its agents, tore down the plaintiff's house, thereby preventing him from removing his stock of goods, damaging him to the amount above stated.

The defendant pleaded the general issue.

The following evidence was introduced:

Edward Kuttner, the plaintiff, testified as follows: On the night of February 22d, 1871, a fire broke out in the hotel in the town of Dawson, some fifty or seventy-five yards from the store-house of plaintiff. Plaintiff commenced moving his goods, when N. C. Greer, one of the Town Council, and acting as Mayor, told him to stop, as they were about to tear down his house. The amount claimed in the declaration is only about fifty per cent. of his losses. Plaintiff was prevented from removing his goods by the tearing down of his house by the people, under the authority of the defendant. The goods were burnt up. Plaintiff did not tell Mr. Atkinson that he had removed all of his goods of any value before the house was torn down; did not tell him that the boxes left

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in the house were empty, and that the crockery left was of very little value. There was no insurance on the goods. Plaintiff begged Mr. Greer not to allow his house to be torn down. The work of tearing the house down rendered it unsafe to go near.

EVIDENCE FOR THE DEFENDANT.

Henry Atkinson testified as follows: On approaching plaintiff's store on the night of the fire, witness discovered some boys pulling off the weather-boards; witness stopped them, saying, plaintiff must have time to remove his goods; then went to the door of the store, but could not get in, it being so crowded with men bringing out goods; after the door was cleared, witness went in and told plaintiff that he would have ample time to remove his goods; after the lapse of some fifteen or twenty minutes, witness returned and found no one at work; saw plaintiff standing inside the store alone; asked him if he had removed all of his goods; he replied, "I think I have got all out of any value;" seeing some boxes, witness asked him what was in them; he replied, "they are all empty;" witness feeling something soft under his feet, which he thought might be matting or bagging, asked him what it was; he replied, "it might be some old corn sacks;" witness then turned to go out of the house, saying to the plaintiff, that if he was ready, they would proceed to tear down the house; before leaving the house, witness told him that there were some pieces of crockery on the shelves; he replied, "what remains is of very little value." The work of removing had stopped when witness went into the store, because there were no goods left. The building was just as safe when the posts were out as any other building.

N. C. Greer testified as follows: Witness did not tell or order Mr. Kuttner to stop removing his goods because they were going to tear down his house. Witness was not acting on that night as Mayor; Dr. Farnum was Mayor, and witness thinks he was in town, representing himself. Told plaintiff that he had plenty of time to remove his goods. The fire

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was in the house next to plaintiff's before his was pulled down. Plaintiff requested witness to stop them from pulling down his house. Witness gave no orders to Mr. Cozart on that night. Witness acted as President of the Council in the absence of Dr. Farnum.

William R. Cozart testified as follows: Witness was acting as marshal on the night of the fire; was about plaintiff's store after a portion of the weather-boards were removed; saw some crockery and pot ware on that side of the house, but cannot state its value; the house was pulled down, and this was necessary to save the remainder of the town above his store; during the first part of the fire witness was engaged elsewhere under the direction of Mr. Greer, taking care of goods, placing guards over them, etc. Mr. Greer acted as President of the Council in the absence of Dr. Farnum.

H. S. Lee testified as follows: Witness' brother was keeping store in the house just below plaintiff's; witness assisted his brother in removing his goods; all the goods were removed to a place of safety before any attempt was made at tearing down plaintiff's house; all the goods below plaintiff's were saved; plaintiff had a large stock of goods in his house, and the day after the fire when he placed his goods in another store, he still had a large stock.

James E. Lee testified as follows: When witness arrived at plaintiff's store on the night of the fire, he commenced removing goods, but soon quit to assist in tearing down the house. The reason that he did this was because he thought he could do more good tearing down the house than in removing the goods; plaintiff had some goods burned; cannot say how many.

REBUTTAL.

The plaintiff, reintroduced, testified as follows: In plaintiff's conversation with Mr. Atkinson about the removal of his goods, he had reference to the goods damaged by pulling off the weather-boarding of his house, preparatory to cutting it down.

The jury returned a verdict for the plaintiff for \$600 00.

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The defendant moved in arrest of judgment, because the declaration failed to show any liability on the part of defendant, and for a new trial, because the verdict was contrary to the evidence.

Both motions were overruled, and the defendant excepted upon each of the grounds aforesaid.

F. M. HARPER, by CLARK & GOSS, for plaintiff in error.

WOOTEN & HOYLE, for defendant.

MCCAY, Judge.

The Revised Code, section 2200, says: "Analogous to the right of eminent domain, is the power, from necessity, vested in corporate authorities of cities and towns and counties to interfere with, and some times to destroy, the private *property* of the citizens for the public good, such as the destruction of houses to prevent the spread of a conflagration, or the taking possession of buildings to prevent the spread of contagious diseases. In all such cases, any damages accruing to the owner from such acts, and which would not otherwise have been sustained, must be paid by such corporation."

It is argued that a corporation is only liable for houses and buildings it may destroy, under this section of the Code, and that damages are not recoverable for personal property, whether in the house or not, and that none but the *owner* of the house can sue. But we think this is not a fair criticism upon the language used, and would, if adopted, be not only unjust to the citizen whose property is destroyed, but would be a limitation on the power of a town, city or county, often seriously hurtful. Suppose a fire is about to reach a board-yard, or a lot of loosely packed cotton, or a quantity of any other combustible material, classed as personal property, must the flames be permitted to go on because the public dare not treat this trumpery stuff as it might a man's house—his castle—the home of his family?

The law is broad enough to cover any kind of property,

personal or real. The first words used are, "the private property of the citizen." This is very comprehensive language. Section 5 of the Code says, "property" means, in the Code, "real or personal property." The after language, in which the more limited words, as houses and buildings, are used, merely gives *instances*. The words are, "such as houses," etc. So, too, the use of the word "owner" has plain reference to the owner of the *property* damaged.

We shall not undertake to go over this evidence and weigh it. The jury of the vicinage has done that, and the Judge has refused to interfere with it, nor will we. The evidence is conflicting, and in such cases we have neither the wish nor the right to interfere.

Judgment affirmed.

THE STATE OF GEORGIA, *ex rel.* JAMES M. LENNARD, plaintiff in error, vs. JOHN A. FRAZIER, defendant in error.

1. Section 918, Revised Code, authorizing the Governor to vacate the commission of defaulting tax collectors, is not "inconsistent with" Article IX. of the Constitution, which provides that county officers "shall be removable, on conviction, for malpractice in office, or on the address of two-thirds of the Senate," so as to be annulled by said Article, or by section 8, Article XI., of the Constitution.
2. Article II., section 4, of the Constitution provides, that "no holder of any public moneys shall be eligible," etc., and section 120, Revised Code, makes the failure or refusal by all holders or receivers of public money of the State to account for or pay over the same, after reasonable opportunity, "a sufficient reason for vacating any office held by such person." Section 918 of the Code provides, that the Governor may so vacate a commission in case of a defaulting tax collector.

Quo warranto. Information. Officer. Tax collector. Before Judge JOHNSON. Muscogee Superior Court. November Term, 1872.

Lennard petitioned the Judge of the Superior Court of Muscogee county for leave to file an information in the name

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of the State, in the nature of a *quo warranto*, calling upon Frazier to show by what authority he was exercising the duties of the office of tax collector of said county, and why he should not be removed therefrom, etc.

The petitioner alleged that he was eligible to the office of tax collector of said county, to which he had been elected for the term of two years, at an election held on the 20th, 21st and 22d of December, 1870; that he was duly commissioned by the Governor of the State, and that his term of office has not yet expired. That Frazier is discharging the duties of said office and receiving the emoluments.

Leave was granted in accordance with the prayer of the petition, and the information was filed by the Solicitor General of the Chattahoochee Circuit.

The answer of Frazier admitted the facts stated in the information, but alleged that relator, during the year 1871, as tax collector, collected the State taxes in Muscogee county, but failed to pay over the same promptly to the Comptroller General, and failed to pay them into the State Treasury by December 20th, 1871, although said fund was frequently demanded of him; that on September 12th, 1872, relator was a defaulter to the State in the sum of \$8,295 13; that the Governor of the State of Georgia, on the day last aforesaid, by virtue of the authority vested in him by section 918 of the Code, did vacate the commission of relator; that on September 16th, 1872, respondent was appointed tax collector of said county, by Francis M. Brooks, the Ordinary, to fill the vacancy caused by the removal of relator; that respondent gave the required bond, and on September 18th, 1872, was duly commissioned by the Governor; that he has been, since the day last aforesaid, discharging the duties of the office, and receiving the emoluments under and by virtue of the appointment and commission aforesaid.

To the answer were attached, as exhibits, the Executive order vacating the commission of Lennard, and the order of the Ordinary appointing respondent. The commission of the

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Governor, under which respondent was acting, was produced in Court.

Relator traversed that portion of the answer which alleged that he was a defaulter. Respondent demurred to the traverse. The demurrer was sustained, and relator excepted.

After argument had, the information was dismissed, and relator excepted.

R. J. MOSES; M. H. BLANDFORD; CARY J. THORNTON, by Z. D. HARRISON, for plaintiff in error.

PEABODY & BRANNON, for defendant.

TRIPPE, Judge.

The collection and protection of the revenue of the State is of such paramount interest, that the most stringent provisions for that purpose are to be found both in the Constitution and the Code. No tax payer can contest, by litigation before the Courts, the amount assessed against him as due the State. The State cannot permit the receipt of its revenue to be delayed, by becoming a litigant in the Courts, and hence provided in section 3618 of the Code: "No replevin shall lie, nor any judicial interference be had in any levy or distress for taxes under the provisions of this Code," etc.

The Constitution, Article II., Par. 4, says: "No person who is the holder of any public moneys shall be eligible to any office, in this State, until the same is accounted for and paid into the treasury." Section 129 of the Code prescribes that, "all public officers shall swear that he is not the holder of any public money due this State unaccounted for." Section 120 is: "The following persons are held and deemed ineligible to hold any civil office in this State, and the existence of either of the following state of facts is a sufficient reason for vacating any office held by such person. * * All holders or receivers of public money of this State, or any county thereof, who have refused when called upon, or failed after reasonable opportunity, to account for and pay over the same to the

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proper officer." Section 918 provides that, "the Governor may vacate the commissions of defaulting tax collectors, or of tax receivers, failing or refusing to do their duty, and in such event the vacancy shall be filled in the manner prescribed for other vacancies."

These provisions demonstrate what strong guards and means for summary protection both the organic and statute law throw around the public money. The running of the State machinery is so intimately connected with its treasury, and may be said to be so dependent upon it, and is of such transcendent importance to the citizens and the public, that it cannot be subjected to the ordinary rules governing in other cases. Though great power is given to the Governor in the case of tax collectors and tax receivers, public policy and public necessity require it. Unless summary power and a speedy remedy be lodged somewhere, great danger may ensue—a danger greater to the State than a possible wrong that may be done by mistake, or otherwise, to the officer.

It is contended that Article IX. of the Constitution, which says that county officers "shall be removable, on conviction, for malpractice in office, or on the address of two-thirds of the Senate," is inconsistent with section 918 of the Code, and consequently that section is abrogated by Article II., Par. 3, of the Constitution. But is there any conflict between these two provisions? The intention of the Constitution is to provide for the removal, as a penalty, to have a judgment pronounced by the Court or the Senate which shall operate as a removal, as a *throwing out of office*, by virtue of that sentence. But in the case of a defaulting tax collector, one who holds public money unaccounted for, and who, by the Constitution and the law, is ineligible to take or to hold office, the law is not that the Governor shall remove, but, on account of that *status* of ineligibility, shall declare the office vacant, and that some one shall be put in who is constitutionally competent. It may be asked, who is to determine the default? This is provided for. There is an officer from whose decision on this there can be no appeal—at least, no appeal to any legal rem-

edy. When the Comptroller General so pronounces and issues an execution against a tax collector, by judgment of law, which he is not allowed to deny, he is in default, and is presumed to be a holder of public money unaccounted for, and, by judgment of law, is in a condition of constitutional disability to continue in office. The Governor has, in fact, no option but to provide the State another officer who is, by the law, competent to serve. It is, *pro hac vice*, as if the party was dead, or had removed beyond the limits of the State. Of course, it is not intended that such an officer, in case of a criminal prosecution for his default, is denied the right to contest the action of the Comptroller General. There, all the rules obtaining in criminal cases would apply, but all the consequences as to an absolute right to recover the money and to vacate his commission would attach.

But further, conceding that the vacating the commission of the officer and removal from office, are in law equivalent, why may not the means provided by the statute and by the Constitution be said to be cumulative remedies or provisions for the protection of the public funds? We have seen how far these provisions go, outside of that granting this power to the Governor. If one is a holder of public money, unaccounted for, he shall not have office. Before he can take office he must swear that he is not such holder. If he becomes such whilst in office, he shall be removed. And if he holds an office so highly important in its relations to the public revenue as that of tax collector, is it not a wise provision for the State to be protected against delay in the removal of one in default, by an appeal to the Courts or awaiting a session of the General Assembly? This seems to be the spirit and purpose of all the provisions on this subject.

Judgment affirmed.

Dixon vs. Edwards.

JOHN L. DIXON, administrator, *et al.*, plaintiffs in error, vs.
LEWIS H. EDWARDS, defendant in error.

1. Where the defendant is security upon a note, and is the administrator of the maker, and is sued in both characters, the plaintiff is an incompetent witness. (R.)
2. Where the defense set up to a suit on the note, is that the money for which said note was given, was borrowed for the illegal purpose of aiding and encouraging the rebellion, it is competent for defendant to prove a conversation between himself and plaintiff, in which defendant stated to him that he knew the money was borrowed for the purpose of aiding and encouraging the rebellion, and that he (plaintiff) did not deny this allegation. (R.)
3. Where a part of a conversation is placed in evidence, the whole is admissible. (R.)
4. Where an administrator is sued as such, and as security upon the note made by his intestate, the statements made to him by his intestate in reference to the matter in controversy are inadmissible. (R.)

Witness. Consideration. Rebellion. Evidence. Admission. Before Judge WRIGHT. Meriwether Superior Court. August Term, 1872.

Lewis H. Edwards brought complaint against John L. Dixon, as administrator upon the estate of George A. Hall, as principal, and said John L. Dixon, as security, on a promissory note, dated August 29th, 1861, due one day after date, for \$200 00, payable to the plaintiff or bearer. The defendant pleaded the general issue; that he tendered to the plaintiff, in the summer of 1862, the principal and interest due upon said note, (whether Confederate money or not does not appear) and he declined to receive it, stating that he had no need of the money, and he would not charge defendant any interest until he demanded a settlement; that the money for which said note was given was borrowed from the plaintiff, with his knowledge, for the purpose of aiding and encouraging the rebellion.

The plaintiff introduced the note in evidence, and then proposed to prove facts, by himself, tending to show that the money borrowed was not used for the purpose of aiding and

encouraging the rebellion. The defendant objected to the plaintiff's testifying, upon the ground that the other party to the contract was dead. The objection was overruled, and defendant excepted.

Plaintiff testified and closed.

Defendant proposed to prove, by himself and John W. Park, Esq., that in the fall of 1862, he tendered to the plaintiff the money due on the note, and he declined to receive it; that defendant again, on the same day, went to see plaintiff, in company with John W. Park, Esq., and tendered him the amount of the money due upon the note, and insisted upon his receiving it, telling him that Colonel Hall had lost his life in defense of the country, and their common property; that plaintiff knew the money was borrowed to enable said Hall to buy a horse and military equipments for the service of the Confederate States; that the horse and Hall were both killed, defending plaintiff's and witness' property; that neither witness nor Hall had received any benefit from the money; that he (defendant) thought that he (plaintiff) ought to take it; that Edwards never denied the purpose for which the money was borrowed, but stated that he did not then need it; that Hall had promised, certainly, to pay the money at Christmas, 1861, and as it was not paid then, he did not now want it; that defendant could keep the money without interest until the war was over; that he could not use the money; that if the war was successful, defendant could pay him just what Hall borrowed, and if it proved a failure he would not require him to pay anything.

Upon objection made to said testimony, the same was excluded, and defendant excepted.

The defendant proposed to prove, by his own testimony, that in the fall of 1865, after the conclusion of the war, he tendered to the plaintiff in greenbacks the face of the note, with interest to the time of a tender made in March, 1863, and with interest from the close of the war to the time of the tender in the fall of 1865; also, that he tendered to the plaintiff the full amount of the verdict rendered by the petit jury,

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upon the first trial (the principal of the note, with interest to March 1st, 1863,) immediately after it was rendered; that both of these tenders were refused.

Upon objection made, this evidence was excluded, and the defendant excepted.

The defendant further proposed to prove, by his own evidence, that at the time the money was borrowed, Hall was the captain of a military company in the service of the Confederate States; that said company was, at that time, encamped in the county of Meriwether, and Hall wished to borrow this money to buy him a horse, sword and uniform, to be used as a soldier in the service of the Confederate States; that Hall told defendant that he could borrow the money from the plaintiff with his name, and that defendant, under this state of circumstances, signed the note, and Hall obtained the money and used it for the purposes above designated.

Upon objection made, this evidence was excluded, and the defendant excepted.

The Court charged the jury, *inter alia*, as follows:

“That it was not necessary for the plaintiff to prove or show that the note sued upon was not founded upon, or in any way connected with any such illegal contract as was set forth in the plea, and was not made in aid of the rebellion, but that it was sufficient for the plaintiff to prove that he had no knowledge of the purpose or use to which the money, or any part thereof, for which said note was given, was applied.”

To which charge the defendant excepted.

The jury returned a verdict for the plaintiff for the full amount of said note, principal and interest.

The defendant assigns error upon each of the aforesaid grounds of exception.

GEORGE L. PEAUVY; J. W. PARK, for plaintiff in error.

1st. Edwards was an incompetent witness: Code, sec. 3798; 36 Ga. R., 565; 37 *Ibid.*, 118; 39 *Ibid.*, 186; 40 *Ibid.*, 490; 44 *Ibid.*, 49.

2d. The Court erred in ruling out the testimony of Dixon:

Code, sec. 3737; 2 Nott. and Mc., 336; 1 Greenleaf's Ev., secs. 197, 199.

A. H. FREEMAN; WRIGHT & DENT, for defendant.

The law of tender: Code, sec. 2823; 35 Ga. R., 8; 24 Ga. R., 11. Contracts void in aid of the rebellion: Constitution, Art. V., sec. 17; Code, sec. 5213; 40 Ga. R., 701. As to competency of Edwards: 36 Ga. R., 520, 567; 37 *Ibid.*, 623; 38 *Ibid.*, 103. Admissions scanned with care: Code, sec. 3739.

WARNER, Chief Justice.

1. This was an action brought by the plaintiff against the defendant, as administrator of Hall, and as the security of said Hall, the intestate, on a promissory note for \$200 00, payable to the plaintiff, dated 29th August, 1861, and due one day after date. The defendant filed a plea alleging, under oath, that the note was executed by his intestate for the illegal purpose of aiding and encouraging the rebellion, as provided by the 2d paragraph of the 17th section of the V. Article of the Constitution of 1868. On the trial of the case, the plaintiff was sworn and offered as a witness in his own favor, for the purpose of proving that if it was the intention of Hall, the defendant's intestate, to use the money for which the note was given in aid of the rebellion, that fact was not known to him. The defendant objected to the plaintiff's being sworn as a witness, on the ground that Hall, the other party to the contract, was dead, and that the suit thereon was against him as administrator of his intestate. The Court overruled the objection, and the defendant excepted. The 3798th section of the Code, which provides that parties to the suit may be witnesses in their own behalf, makes the following exceptions: "Where one of the original parties to the contract or cause of action in issue or on trial, is dead, or where an executor or administrator is a party in any suit on a contract of his testator or intestate, the other party shall not be admitted to testify in his own favor." Hall, one of the

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original parties to the contract sued on, is dead, and his administrator is a party to the suit on that contract of his intestate, and the statute declares, in express terms, in such cases, that the other party to the contract shall not be admitted to testify in his own favor, and such has been the construction given to the statute by this Court: *Leaptrot vs. Robinson*, 44 *Georgia Reports*, 46. The fact that the defendant, who is sued as administrator of the intestate, signed the note as security for the intestate, and is sued as such in the same action with the administrator of the intestate, does not alter or change the rule. It was said, on the argument, that to exclude the plaintiff from testifying in his own favor in this class of cases, under the provisions of the Constitution of 1868, where the defendant makes oath to his plea, and thereby devolves the burden of proof on the plaintiff, will operate as a great hardship on him; that may be so, but it is not the business or duty of the Courts to make the law; their duty is to administer and enforce it as it exists. The statute does not make this particular class of cases an exception to its operation when one of the parties to the suit is dead, and the Courts cannot do so. When a statute speaks in plain, unambiguous language, it speaks like a tyrant, to be obeyed by Courts and people. In our judgment, the Court below erred in admitting the plaintiff to testify in his own favor in this case.

2. The defendant then proposed to prove by himself, as a witness in his own behalf, and by John W. Park, Esq., who was also present, that in the fall of 1862, he tendered to the plaintiff the money due on the note, (the record does not state what kind of money,) and that plaintiff declined to receive it, defendant stating to the plaintiff, at the same time, that *he knew* the money was borrowed to enable Colonel Hall to buy a horse and military equipments for the service of the Confederate States; that the horse and Hall were both killed defending plaintiff and witness' property, etc., and he thought plaintiff ought to take the money. Plaintiff never denied the purpose for which the money was borrowed, but stated that he did not then need the money; that defendant could

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keep it until the war was over, without interest, etc. This evidence was ruled out by the Court, and the defendant excepted. In our judgment, that portion of the evidence which charged the plaintiff with a knowledge of the purpose for which the money was borrowed of him by Hall, and not denied by him at the time, was competent evidence to have been submitted to the jury: Code, 3737.

3. The plaintiff was entitled to have the whole of the conversation that took place between the parties at the time given in evidence, so that the jury might judge of its weight and effect. The evidence was competent for what it was worth in the estimation of the jury, and it was error in the Court in ruling it out.

4. The other testimony of Dixon, the defendant, which was ruled out, as specified in the record, was competent, so far as he proposed to state facts within his own knowledge pertinent to the issue on trial, but not as to facts derived from Hall, his intestate, or as to what he told him. If the previous evidence of the defendant and Park had been admitted, as, in our judgment, it ought to have been, then this latter evidence of Dixon would have been admissible for the consideration of the jury, in connection with that other evidence as to the knowledge of the plaintiff as to the purpose for which the money was borrowed. We express no opinion as to the weight or effect this evidence should have with the jury. All that we decide is, that it was competent evidence to have been submitted to them. If the evidence improperly ruled out had been admitted, then we should have held that the charge of the Court to the jury was error, but if that evidence had been properly ruled out, we should not have reversed the judgment for error in the charge of the Court, on the statement of facts then before the jury when the charge was given.

Let the judgment of the Court below be reversed.

Griffin & Clay vs. Treutlen.

GRIFFIN & CLAY, plaintiffs in error, vs. JOHN F. TREUTLEN, defendant in error.

It is not sufficient to make a mortgage lien good against a homestead and exemption, under the Act of 1868, that it was given in lieu of another mortgage on the property, unless it further appear that the first mortgage or lien was a lien superior to the right of homestead. There is nothing in the record which shows that the original lien or mortgage was good, in spite of the homestead, either by the laws of Alabama or Georgia.

Homestead. Removal of incumbrance. Mortgage. Before Judge HARRELL. Clay Superior Court. September Term, 1872.

Griffin & Clay foreclosed a mortgage, executed by John F. Treutlen, on nine head of mules, to secure the payment of a promissory note for \$1,407 55, on April 8th, 1871, and had the execution issuing therefrom levied upon the mortgaged property. The mules had been exempted, under the homestead law, prior to the levy. To procure the levy to be made, the plaintiffs filed their affidavit to the effect that the debt for which they were proceeding, was one against which the homestead exemption was not a legal protection. The defendant filed a counter-affidavit, and thus the issue was formed.

Upon the trial, the plaintiffs introduced a mortgage upon the same property, executed by the defendant to plaintiffs in Alabama, on March 8th, 1870, to secure the payment of \$1,296 00, to be due on November 8th, 1870, advanced by plaintiffs to the defendant, for the purpose of enabling him to make a crop, said lien having been given in accordance with an Act of the General Assembly of the State of Alabama, approved January 16th, 1866, and amended February 25th, 1867.

The defendant, on being introduced by the plaintiffs, testified that the debt for which the mortgage execution was proceeding, had been contracted by him with the plaintiffs to cancel and satisfy the mortgage executed in Alabama, and on no other consideration. That the mules had been exempted

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under the Homestead Act, subsequent to the date of the mortgage from which the execution issued.

The Court charged the jury, "that if the debt now sought to be collected, was made to satisfy and cancel the aforesaid written contract, (the Alabama mortgage) yet the jury must find the issue for the defendant."

The jury returned a verdict for the defendant, whereupon plaintiffs excepted to said charge, and now assign the same as error.

JOHN T. CLARKE, for plaintiffs in error.

R. A. TURNIPSEED; J. C. WELLS, for defendant.

McCAY, Judge.

It is true that the Constitution and the Act of 1868, in terms, provides that a homestead shall not be good against a debt contracted for the removal of an incumbrance. But this, as a matter of course, means an incumbrance not in name but in fact; an incumbrance, which, unless removed, would sell the homestead. The source cannot rise higher than the fountain. It would seem absurd to say that if a debt exist, which is not a *good* incumbrance on a homestead, that a debt contracted to pay that *shall* be a good incumbrance. Nor is the case of *Kelly vs. Stephens*, in 39 *Georgia*, 466, contrary to this view. The execution, to remove which was the object of the mortgage given in that case, was, *at the time*, not only a good incumbrance, but it was actually about to sell, and would have sold, the land, except for the money, to secure the payment of which the mortgage was given. There is nothing in the record going to show that the mortgage or lien of which the present mortgage is the successor, was a good incumbrance as against the homestead, and unless that appeared, we see no reason why the present mortgage is.

Judgment affirmed.

King vs. Newton et al.

ALFRED J. KING, plaintiff in error, *vs.* J. J. NEWTON *et al.*,
defendants in error.

An administrator who received Confederate money in 1862, and does not, by his returns, or on the trial of a suit commenced against him in 1871, give any explanation of what became of the money, or what he did with it, cannot complain at being held liable for the full amount so received, especially when the verdict is for four years less interest than what was due.

Administrator. Returns. Confederate money. Before Judge HARVEY. Floyd Superior Court. January Adjourned Term, 1872.

J. J. Newton *et al.*, the heirs-at-law of William Newton, deceased, on June 9th, 1871, cited Alfred J. King, the administrator upon the estate of said deceased, to appear before the Ordinary of Floyd county for a final settlement. The Ordinary rendered a judgment in favor of the administrator. The plaintiffs carried the case by appeal to the Superior Court.

Upon the trial in this last tribunal, the plaintiffs introduced a return of defendant, made on May 28th, 1867, and recorded on August 6th, 1867, showing receipts during the year 1862, to the amount of \$1,996 55, and expenditures during the years 1862, 1863 and 1867, to the amount of \$1,486 77½, leaving a balance in his hands of \$509 77½.

The defendant introduced a return made on July 8th, 1871, the day of the trial before the Ordinary, in which it was stated that the above mentioned balance was in Confederate currency. Proof was submitted of the value of such currency in 1862.

The jury returned a verdict in favor of the plaintiffs for \$509 77, with interest from May 28th, 1867.

The defendant moved for a new trial upon the following, among other grounds:

1st. Because the Court erred in charging the jury, "that both returns had been admitted, and they were admissible for what they were worth; that the facts and circumstances attending the second return were also before the jury, and they could

give it such credit as they should believe it entitled to, under the circumstances; that they might believe it all, or disbelieve all or any part of his returns."

2d. Because the verdict is contrary to the law and the evidence.

The motion was overruled, and the defendant excepted upon the grounds aforesaid.

ALEXANDER & WRIGHT, for plaintiff in error.

WRIGHT & FEATHERSTON, for defendants.

TRIPPE, Judge.

From the evidence, the administrator must have taken out letters of administration in 1860, or 1861. No return was made until May 28th, 1867. This return showed, by the entry made by the administrator himself, a "balance on hand due estate, \$509 77." The vouchers show that amount must have been "on hand" as early as *December*, 1862. After proceedings were commenced against the administrator in 1871, to-wit: in July of that year, the administrator made another return reciting that the former return, by mistake, omitted to state that said balance was received by him in Confederate currency, and that such was the fact. This return does not show what the administrator did with that balance; whether it was forced to remain in his hands, by there being no one then competent to receive it, and that it was thereby lost, or became worthless whilst in his possession. Indeed, no explanation in the return, or in the evidence, is given as to what became of that money, *or balance*.

The verdict of the jury was for \$509 77, the *amount* of that balance with interest from the 28th May, 1867, the *date* of the return.

The administrator complains that he is made to pay in good funds the amount of the Confederate currency, he received in December, 1862. The jury allowed him more than four years' interest, and if he were entitled to more, he should have shown

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it, either by his returns or on the trial. The presumption is that he used the money, or invested it for himself, and unless he show that he was unable to use it for the estate, or to pay it over to those entitled to it, or by some evidence that he discharged his duty in relation to it, he cannot complain at now being called on for it, especially when an allowance is made to him of four years' interest. Confederate money was not so worthless in 1862 that a trustee can ask that he shall be granted more than the jury did in this case, when he gives no account whatever as to what he did with the funds.

The other questions made in the bill of exceptions were abandoned by plaintiff in error, and the decision made at this term, in the case of *Margaret Johnson vs. J. R. Jones et al.*, disposes of the points involved in the third and fourth grounds in the motion for a new trial.

Let the judgment refusing a new trial be affirmed.

JOHN A. NELSON, plaintiff in error, *vs.* THE CENTRAL RAILROAD AND BANKING COMPANY, defendant in error.

The presumption of the law is that the owner of a lot is acquainted with the condition of his own property, if a natural person, and if an artificial one, that it has such knowledge through its agents and employees. (R.)

Presumptions. Coporations. Principal and agent. Notice. Before Judge COLE. Bibb Suprior Court. April Adjourned Term, 1872.

For the facts of this case, see the decision.

POE, HALL & POE, by CLARK & GOSS, for plaintiff in error.

No appearance for defendant.

WARNER, Chief Justice.

The plaintiff brought an action against the defendant to recover damages for the loss of a horse, killed by falling into a dry well on the lot of defendant. On the trial of the case, the jury, under the charge of the Court, found a verdict for the defendant. A motion for a new trial was made which was overruled by the Court, and the plaintiff excepted. It appears from the evidence in the record, that the plaintiff turned his horse into a lot to graze, the fence being down the horse went out of that lot and went into the defendant's lot, the fence around the latter lot being partly down, and fell into the well and was killed. The two lots were near each other. It also appears from the evidence, that the well was so concealed by rubbish and grass, and weeds growing over it, that ordinary care and observation would not have discovered it. When the plaintiff went to the defendant's agent at the depot to complain about the matter, Irvine, the agent, said "that he had had plank put over the mouth of the well, but the freedmen had stolen them off." The Court charged the jury, "that if they believed, from the testimony, that the plaintiff and defendant were ignorant of the existence of the well on the lot, that they must find for the defendant, and that the knowledge of the fact by Irvine, the master of transportation of said defendant, was not sufficient proof of the fact." This charge of the Court, in view of the evidence contained in the record, was error.

The presumption of the law is that the owner of the lot knew that the well was on it; as the owner, when in possession, is presumed to know the condition of his own property, if a natural person, or by its agents and employees, if an artificial one; but the evidence is that the agent of the defendant knew that the well was there, and the knowledge of the defendant's agent of that fact was sufficient to charge the defendant, inasmuch as a corporation can only be charged with a knowledge of facts through its agents and employees, in the conduct and management of its business. The owner of prop-

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erty, whether a natural or artificial person, must so use it as not to injure or endanger the property of other persons. This dangerous concealed pitfall, on the lot of the defendant, should have been securely enclosed, so as to have protected the property of other persons from injury, and it was culpable negligence to have left it in the condition the evidence shows it to have been when the horse was killed by falling into it. If the evidence had shown that the defendant had kept the lot enclosed by a lawful fence, and the plaintiff's horse had broken into the lot and been killed by falling into the well, then it would have presented a different question as to the defendant's liability. There was no evidence of that kind, however, offered at the trial, but on the contrary, the evidence is that the fence around the defendant's lot was partly down, and the horse went in and fell into the well and was killed.

Let the judgment of the Court below be reversed.

ALFRIEND & COLEMAN, plaintiffs in error, vs. JOHN H. DANIEL, executor *de son tort*, defendant in error.

Under section 2406 of the Revised Code, if one chargeable as executor *de son tort* die, his administrator, as such, is chargeable in the same manner and to the same extent as was his intestate, but the administrator does not himself become an executor *de son tort* by taking possession of property found in possession of his intestate, at his death, even though that property was in the possession of the intestate as the executor *de son tort* of another deceased person.

Executor *de son tort*. Before Judge HARRELL. Terrell Superior Court. May Term, 1872.

Alfriend & Coleman brought complaint against John H. Daniel, as executor in his own wrong upon the estate of Westley Daniel, deceased, on an account for medical services rendered to said Westley Daniel, amounting to \$176 00, besides interest. The record fails to disclose any plea as filed by the defendant.

The evidence for the plaintiffs made the following case: The account was admitted to be correct as against Westley Daniel. Westley Daniel died about January 1st, 1870. His property, exceeding largely the debt sued for, went into the possession and control of his widow. She died during the last of 1870 or first of 1871. The defendant took possession, as her administrator, of what property she left, but did not know whether any of said property ever belonged to Westley Daniel, deceased. Two mules, of the value of about \$140 00, which the widow had at the time of her death, had been worked by Westley Daniel during his life, and were under his control at the time of his death. He treated them as if they belonged to him.

Upon motion, the Court awarded a non-suit, and plaintiffs excepted, and now assign said ruling as error.

WEST & KIMBROUGH, by C. B. WOOTEN, for plaintiffs in error.

F. M. HARPER, by CLARK & GOSS, for defendant.

MCCAY, Judge.

There is no pretence in this record that the defendant below ever dealt or interfered in any way with this property as the property of the deceased person whose executor he is charged to be. He found the property among the effects of Mrs. Daniel, and he took possession of it as hers, by virtue of his right and duty as her administrator. Nothing is better settled than that if one acquire the effects of an intestate from an executor *de son tort*, this does not make the present possessor an executor *de son tort*: Com. Dig. Adm'rs, chap. 2; 1 Williams on Executors, 216.

The theory of an executorship *de son tort*, is that if one meddles with the property of a dead man, it is a fair presumption that there is a will and that the meddler is executor. But if the holder have the possession under a claim of right, however that claim may, in fact, be defective, or only that it

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be not fraudulent, he is not executor *de son tort*: 1 Esp., 335. The defendant here had a right, nay, it was his duty, as administrator, to take possession of this property. He found it among the effects of his intestate, and if he had failed to take charge of it he would have been liable for any harm that might come to it.

An executor *de son tort* is in some sense, especially under our law, a criminal. He is subject, under section 2406 of our Revised Code, to a penalty; and it would be outrageous to charge a man with a penalty for doing that which it was his duty to do. As administrator, the defendant is liable for any malfeasance of his intestate, but this action is against him as an individual. We do not think his acts make him liable as executor *de son tort*, for the simple reason that in his taking possession he did not take it as the property of the deceased but as the property of Mrs. Daniel, whose legal representative he is. He stands as to it just as one would who had bought from her. The law casts the title on him as a purchaser. If the title be bad, the property may be recovered from him, but he has not by performing his simple duty as administrator made himself liable as executor *de son tort*.

There is nothing of sufficient definiteness in the testimony as to the money, to make out the case. It is meagre, indefinite, fixes no amount, nor are we able to say exactly what its significance is.

Judgment affirmed.

JEFFERSON HOGAN, plaintiff in error, vs. DAVID H. MOORE et al., defendants in error.

A promissory note was given, payable at twelve months. The note was transferred by the payee, and a few days after its maturity the transferee or bearer indorsed the note to plaintiff. It does not distinctly appear from the evidence whether the first transfer was made before or after the maturity of the note. The defense against the note was that the payee procured it by duress or threats amounting to fraud.

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The Court charged the jury, that if the note was procured by duress—stating what constitutes duress—and the plaintiff came into possession of the note after it fell due, they would find for the defendant:

Held, That this charge of the Court was error, inasmuch as it assumes that the first transfer of the note was not made until after its maturity. If the first transferee came into the possession of the note before it was due, and the law presumes he did unless the contrary was proven, then under the decision in *Robinson vs. Vason et al*, 37 Georgia, 86, the defenses could not be set up against him, and his indorsee holds the note free from all the equities against which it was protected in his hands.

Promissory notes. Duress. Before Judge GREEN. Pike Superior Court. October Term, 1871.

Jefferson Hogan brought complaint against David H. Moore, principal, and John A. Jackson and Thompson Graham, securities, on a note made by said defendants on September 22d, 1865, payable twelve months after the date thereof to J. B. Stafford, or bearer, for \$604 55. On the note were the following entries:

“For value received, I indorse the within note, not liable in the first instance. October 3d, 1866.

(Signed)

“J. F. HANSON.”

“Received on the within note \$200 00 from J. A. Jackson, per E. M. Amos. This 23d February, 1867.”

The defendants pleaded the general issue, and that the note was procured by fraud and duress.

The plaintiff introduced the note sued on, and closed.

The defendants introduced the following testimony:

D. H. Moore, sworn, says: In 1859 he purchased about one hundred and seventy-five acres of land of H. W. Hall, for about the sum of \$1,750 00, and gave J. S. Head as security. The note was made payable to H. W. Hall. Subsequently James B. Stafford came into possession of the note. In 1863, between the 1st and 10th days of August, J. L. Head died. Subsequent to that date witness renewed the note, made it payable to J. B. Stafford for about \$2,000 00, and gave John A. Jackson and Thompson Graham as his securities; the note was

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dated about the latter part of August, or some time in September, 1863. Subsequent to its maturity, witness paid \$500 00 which was accepted as a credit on the note. After the surrender in 1865, in the month of August or September, Stafford approached witness and demanded a settlement; witness replied that he had no money. Stafford told witness that he had made arrangements with a friend in Kentucky who would take the note for goods, sue in Federal Courts, and use the Federal soldiers, and dispossess witness and his securities at once, and hold their lands until the debt was paid. Witness was greatly alarmed because of the threats, as the country was full of Federal soldiers at the time, and as he believed they would interfere and dispossess him and his securities, and under this belief and because of the threats aforesaid, witness was induced to make the settlement proposed by Mr. Stafford. At this time he turned over to Stafford the original quantity of land purchased from Hall, save ten acres and forty additional acres, which was valued at the time at about \$1,200 00, probably \$1,150 00. He turned over to him twelve hundred pounds of lint cotton, at twenty-seven cents per pound, which amounted to \$324 00 or \$325 00, and gave the note now sued on for \$604 00. Witness says the lands turned over to Stafford were worth \$1,500 00 at the time they were turned over. There was no money in the country at the time; probably the land would not have brought more than \$4 00 per acre in the market, because there was no money in the country; he would not have taken less than \$1,500 00 in currency for the land, but for the threats of Stafford, as he would not have parted with the same. He would not have sold the cotton at the price, or renewed the note, but for the threats of the interference on the part of the Federal soldiers, made by Stafford. It was not the threat of suit in the Federal Court that aroused the fears of witness, but the threat of the interference of the military. In 1866, after the maturity of the note, and after the same had gone into possession of Hogan, the plaintiff, suit was threatened in the Federal Court. Witness consulted Col-

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onel Whittle, of Macon, with the view of making his defense; the same defense he is now making. Whittle advised him that his defense could be better made in the State than Federal Courts, and advised witness to make a payment so as to reduce it below the Federal Court jurisdiction, and when sued in the State Courts, then to make his defense. With this view the payment was made, and not with a view to ratify the contract. Witness offered to pay the note dated in 1863, in Confederate money which Stafford refused. Witness put about \$400 00 worth of improvements on the land. It was only the threat of military interference, and from fear that the military would interfere that induced witness to part with his property and renew the note.

Thompson Graham, sworn, says: In 1865, about the time the note sued on was made, Stafford threatened to invoke the interference of the military, and dispossess Moore, Jackson and witness, unless the note of 1863 was paid. Under these threats, Moore turned over his land, some cotton and gave the note now sued on; Stafford put his own price on the land and cotton and would settle no other way; the land was worth \$1,500 00. There was no land on the market at that time, as there was no money in the country, and witness cannot tell what was the market value, but it lay on the railroad, was well improved and worth at least \$1,500 00. Witness did not induce Moore to give up his land; witness held a mortgage on the land to save him harmless, as security, and gave it up and let the land be transferred, because he thought the Federal soldiers would dispossess him of his property by force; but for the threats of Stafford he never would have consented to the settlement and the making of the new note; witness offered at one time to pay Stafford, with Confederate money, a note Stafford held against him, and he refused to take it.

John A. Jackson, sworn, says: In 1865, about the time the note now sued on was renewed, Stafford threatened to invoke the interference of the military, and induced Moore to give up his property and to give a new note; witness would never have signed the note but for the threats of Stafford; he was

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afraid of interference; Stafford applied for payment; the note was not paid; after Hogan became in possession of the note he threatened suit in the Federal Court; witness, in company with Moore, went to see Whittle for the purpose of making this defense; Whittle advised them to make a payment, reduce the note below the Federal jurisdiction, and when sued in the State Court make this defense. With this view the payment was made, not with a view of ratifying the contract.

The plaintiff in rebuttal introduced the following testimony:

Jefferson Hogan (the plaintiff) testified that he had owned the note sued on since October, 1866.

J. B. Stafford testified as follows: In the fall of 1865, I took a note from D. H. Moore, with John A. Jackson and Thompson Graham, securities, for a fraction over \$600 00, the precise sum I do not remember; I sold the note to J. F. Hanson; the consideration was the balance then due me on another note I held on the same parties for about \$2,100 00, made I think in 1863, but made in lieu of a note formerly held by me on J. L. Head and D. H. Moore, which last named note was made in 1859, I think, and was given for land bought by Head and Moore from H. W. Hall; I do not remember the precise date or amount of the note given by defendants to me, but it was in the fall of 1865, and for a few dollars over \$600 00, and was given for a balance due me on settlement of another note made by the same parties; the date of the note for which the one sued on was given was sometime I think in 1863, and that note given in 1863 (as I think) was given for two notes made by J. L. Head and D. H. Moore, and payable to H. W. Hall and given for land, in 1859, and purchased by me from Hall; I bought the note from Hall in 1859, I think at ten per cent. discount; defendant, Moore, subsequently paid me \$500 00 in Confederate money, but whether on the notes bought from Hall or on the note given me in lieu of the Hall notes, I do not now remember; after I purchased from Hall the notes made by defendants, Moore and J. L. Head, defendant, Moore, gave me in

lieu of these notes his note, with Jackson and Graham, securities, and on the last named note he paid me, in addition to the \$500 00 mentioned above, a tract of land at about \$1,150, and about \$325 00 in cotton or the proceeds of cotton sold me and gave me for the balance due the note now sued on, on which last note nothing was ever paid to me; defendant sold me about one hundred and seventy-five acres of land; I do not know what the land was worth; I sold it in 1866 and 1867 for about \$600 00; I did not threaten to sue defendant, Moore, in any Court if he did not give up the land and cotton to me and renew the note; Moore himself proposed to sell me the land and urged me to take it on the note which amounted at that time, principal and interest, something over \$2,000 00; I took the land to oblige him, at his earnest request and to relieve his securities as far as it went; the defendant did not offer to pay me the note in Confederate money; I never refused to take from him, or any one else, Confederate money when it was offered me in payment of debts.

The Court charged the jury as follows:

“GENTLEMEN OF THE JURY:—The Court charges you that the plaintiff is entitled to recover of these defendants the amount due upon the note sued upon, principal, interest and costs, unless the defendants have shown by evidence some good and sufficient legal reason why he should not. The Court further charges you that these defendants cannot set up any defense against the recovery of the plaintiff upon the note sued upon, unless you believe from the evidence that it was transferred to the plaintiff after due. If then, you come to the conclusion that it was transferred after due, you may inquire into the alleged settlement with Stafford (the original payee of said note), and if, upon inquiry, you find that there is a mistake in said alleged settlement, you may correct it and allow it in your verdict.” (The Court then carefully read twice to the jury section 2710, of Irwin’s Code, and proceeded as follows:)

“If you believe from the evidence that the defendant Moore disposed of his land and cotton to Stafford, and executed the

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note sued upon freely and voluntarily, you should find for the plaintiff the amount due upon said note according to the proof submitted; but if you should believe from the evidence, that Stafford induced and forced the said defendant to give up his said land and cotton, and to execute the note sued upon from fear and alarm induced through threats of Federal bayonets, and that the act was not freely and voluntarily done by the defendants, but was brought about, induced and forced through the threats of Stafford to procure the use of Federal bayonets, or the interference of the military, the contract is fraudulent and void. But you should be satisfied from the evidence, that the contract was made and entered into solely under the fear and apprehension that Stafford would dispossess them of their lands by aid of the military or Federal interference, and if so, you should find for the defendants."

The jury returned a verdict for the defendants. Whereupon the plaintiff moved for a new trial because the verdict was contrary to the law and the evidence, and because said charge was error. The motion was overruled and plaintiff excepted.

T. B. CABANISS; A. D. HAMMOND; PEEPLES & HOWELL,
for plaintiff in error.

JOHN I. HALL, by JACKSON & CLARKE, for defendants.

TRIPPE, Judge.

It was held by this Court in *Robinson vs. Vason et al.*, 37 Georgia, 66, that "Fraud in the procurement of a note, as specified in the Revised Code, means fraud in the procurement by the holder thereof." There may be an innocent holder of a note which was procured by the payee from the maker by fraud, as well as in other cases. Such a holder may transfer the note after dishonor, and his transferee's title will be as good as his own. In this case the note was transferred twice, first to Hanson and afterwards by Hanson to Hogan, the plaintiff. If Hanson obtained the note before maturity for a valuable

consideration, and without notice of any equity against it, his title was good, and so was the party to whom he assigned, no matter when that transfer was made. The Court in the charge told the jury, that if the plaintiff came in possession of the note after maturity, and it was obtained from the maker by duress, they should find for the defendant. This charge ignored the fact that the note had been in the hands of another holder than the payee before the plaintiff traded for it, and thus excluded him from any benefit he might derive as the holder under Hanson. From the record it appears that the plaintiff did obtain the note after it was due. It does not appear when Hanson became the owner of it. That was a material fact, and unless the contrary appears, Hanson will be presumed to have had it before maturity, thus protecting Hogan.

Judgment reversed.

EMMA JONES, plaintiff in error, vs. THE STATE OF GEORGIA,
defendant in error.

1. Where the Court charged the jury, "that every witness in the case is to be believed until impeached in some one of the modes known to the law. A jury cannot arbitrarily, of their own motion, set aside the evidence of any witness; the presumption of innocence attaches to witnesses which remains until removed by proof," and there was no impeaching evidence, unless the statement of the defendant not under oath shall be considered as such, in reference to which the Court charged the jury, "that they were the exclusive judges of the weight that was due to such statement," the charge was not erroneous. (R.)
2. Newly discovered evidence which would not probably have produced a different result is no ground of new trial. (R.)

Criminal law. New trial. Witnesses. Newly discovered evidence. Before Judge Hopkins. Fulton Superior Court. April Term, 1872.

For the facts of this case, see the decision.

Jones vs. The State of Georgia.

JOHN MILLEDGE, by A. H. ORR, for plaintiff in error.

JOHN T. GLENN, Solicitor General, for the State.

WARNER, Chief Justice.

The defendant was indicted for the offense of larceny after a trust delegated. On the trial, the defendant was found guilty. A motion for a new trial was made on the ground of error in the charge of the Court, and on the ground of newly discovered evidence, which was overruled, and the defendant excepted. The alleged error in the charge of the Court is, "that every witness in the case is to be believed until impeached in some one of the modes known to the law. A jury cannot arbitrarily, of their own motion, set aside the evidence of any witness; the presumption of innocence attaches to witnesses which remains until removed by proof." There was no evidence offered on the trial to impeach the credibility of the witnesses examined on the part of the State, unless the statement of the defendant to the jury, not under oath, shall be considered as such. The Court charged the jury, in relation to the defendant's statement, "that you are the exclusive judges of the weight that was due to that statement; you are to give it just such weight as in your judgment it is entitled to." The statement of the defendant, not under oath, cannot be said, in the legal sense of that term, to impeach the testimony of the witnesses for the State delivered under oath. We find no error in the charge of the Court to the jury, inasmuch as the Court left the credibility of the witnesses on the part of the State, in connection with the defendant's statement, to them.

2. The newly discovered evidence is that the defendant expects to prove that she was at a different place on the day the offense is alleged to have been committed, but where she was, does not appear; that she was not *the owner* of a certain alpaca dress which one of the witnesses for the State swore she had on at the time of receiving the clothes to wash, and

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that there was a mulatto woman living in Atlanta by the name of Dora Robinson, about the time of the alleged larceny. If all this newly discovered evidence had been admitted on the trial, it would not even probably have produced a different result. The Courts do not favor new trials on the ground of newly discovered evidence.

Let the judgment of the Court below be affirmed.

RICHARD ROE, *casual ejector*, and O. P. BEALL *et al.*, tenants in possession, plaintiffs in error, *vs.* JOHN DOE, *ex dem.*, SMITH DAVENPORT *et al.*, defendants in error.

Whilst, as a general rule, it is true that one who goes into possession of land under a contract of purchase, cannot, at law, dispute the title of his vendor, so long as his possession is undisturbed, yet if the vendor himself parts with the title, or if it be sold under execution against him, the vendee may, in good faith, attorn to the purchaser, and in an action of ejectment by the vendor against the vendee, the vendee may, though the purchase money is still unpaid, show such sale and attornment as a defense to the action.

Ejectment. Landlord and tenant. Attornment. Before Judge HARRELL. Randolph Superior Court, May Term, 1872.

John Doe, on the several demises of Smith Davenport and of Franklin B. Morris and Thomas Morris, as executors upon the estate of James Morris, deceased, brought ejectment against Richard Roe, casual ejector, and O. P. Beall and B. J. Smith tenants in possession, for a tract of land in the county of Randolph, and *mesne* profits. The defendant pleaded the general issue.

The evidence disclosed the following facts: The premises in dispute were conveyed to James Morris by Smith Davenport on January 9th, 1865. On the 7th of October, 1865, Thomas Morris and Franklin B. Morris, as executors of James Morris, deceased, executed their bond for titles to O. P.

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Beall, conditioned to make to him a title to said property upon the payment of a note made by said Beall for the sum of \$1,500 00, due ninety days after date. There were various payments on this note, the last of which was made on May 12th 1867, making in the aggregate the sum of \$857 00. On November 15th, 1866, the grist mill and water privilege situated on said land, were, by consent of O. P. Beall, conveyed to Edward McDonald and Henry O. Beall, by Thomas Morris and Franklin B. Morris, executors, and Harriet Morris, executrix of said James Morris. This property is not involved in the litigation. O. P. Beall became a bankrupt, and his interest in a portion of the property in dispute was sold by his assignee, B. J. Smith becoming the purchaser. A deed was made by the assignee in accordance with said sale on December 13th, 1868. On July 5th, 1869, an execution issued from the District Court of the United States for the Northern District of Georgia, in favor of Smith Davenport, against Thomas Morris and Franklin B. Morris, executors, and Harriet Morris, executrix of James Morris, deceased, for the sum of \$950 00, with interest from May 1st 1865, and on October 29th, 1870, was levied on all the land in dispute as the property of defendants to said execution as executors and executrix. At the sale under the aforesaid levy, B. J. Smith became the purchaser, and a deed was made to him by the United States Marshal on December 6th, 1870. O. P. Beall took possession of the land at the time of the execution of the bond for titles to him by the executors of James Morris, deceased, and after the marshal's sale, attorned to B. J. Smith, and has since held under a contract of rent with him.

The Court, on motion, dismissed B. J. Smith from the suit, as a defendant, and excluded from the consideration of the jury all evidence tending to show his title to the property, and that O. P. Beall had attorned to and held under him, deciding and so charging the jury, that Beall having originally gone into possession of said property under the bond executed by the executors of James Morris, deceased, could not attorn to and hold under another landlord until the possession had

been first surrendered to those under whom he originally held. To all of which the defendants excepted.

The jury returned a verdict for the plaintiff. Whereupon the defendants moved for a new trial upon the aforesaid grounds of exception. The motion was overruled and the defendants excepted

H. FIELDER; HOOD & KIDDOO, for plaintiffs in error.

WOOTEN & HOYLE, for defendant.

McCAY, Judge.

We think the Judge carried the doctrine of the estoppel of a tenant entirely too far, and especially did he err in rejecting the evidence. Whether one is estopped—that is, whether such facts exist as estop a party, (unless that estoppel be by matter of record) it is for the jury to decide, and not the Judge. The Judge must tell the jury what the law is, and the jury under the evidence decides the result. Is the Judge, as soon as *some* evidence is offered showing that the defendant is the tenant of the plaintiff, to weigh that evidence, decide that he *is* tenant, and stop all his other evidence until the supposed tenant has satisfied him that he is not tenant?

This is an usurpation by the Court of the rights and duties of the jury, and is contrary to section 3183 of the Code; often the whole case turns on the simple question of whether the defendant got possession as tenant of the plaintiff. If he did, the general rule of law undoubtedly is that he cannot set up any title inconsistent with the relation then existing between them. If under the proof the jury are satisfied that the defendant did so go into possession, they should under the law as given them in charge, hold the defendant estopped and give no heed to that part of the evidence which sets up the want of fealty due from a tenant to a landlord. But the Judge erred in holding that the evidence offered in this case came within the rule at all. The foundation of the doctrine is, that a man shall not get possession of land as the tenant, or

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under a bargain with another, and having thus got the advantage, stultify his own act and set up that at the time the title was not in the person from whom he received it. And this applies to regular tenants who hold at will or for years, and to purchasers, who at the time take no title, but leave it with the vendor as security for the payment of the purchase money. But this rule has never been extended to cover a case where the tenant afterwards buys and gets title from the landlord or where the landlord's title ceases, as if it be a life estate, and he dies, or where he sells to a third person or where the title is sold at sheriff's sale or the landlord ceases in any way to be the owner of the land. Indeed, the principle would never seem to come into operation, except when the tenant undertakes to set up a title inconsistent with the idea that *at the time* he took the possession, the landlord had the title which was recognized between them.

These propositions are established by the following cases: *Logan vs. Steel's heirs*, 7 Monroe, (Kentucky) 104; *Casey vs. Gregory*, 13 B. Monroe, 508; *Swann vs. Wilson*, 1 A. K. Marshall, 99; *Jackson vs. Howland*, 6 Wendell, 666; *Nellers vs. Lathrop*, 22 Wendell, 121; *Taylor L. & Ten.*, section 707, 4 Durnford & East; 1 Woodbury & Minot, 61. The subject is also fully treated in *American Law Review*, October, 1871, 23, 34.

The only question that can arise in this case, is whether if a third person has got the title of the landlord against his consent, as by a sheriff's or marshal's sale, the tenant can at-torn to that third person, and on suit by his original landlord, set up this title. We think the authorities are that he may. The purchaser is a privy of the landlord. He buys at the legal sale all the rights the landlord had. Under our law, he could turn the tenant out summarily by the sheriff, since the sheriff is authorized to turn out the defendant, his heirs their tenants, etc. Is the tenant to submit to be turned out? May he not make his peace? Is he not in good faith, as a law abiding citizen, bound to do what the law orders and directs him to do, or must he wait until the officer comes with

his staff and forcibly puts him out? He must act in good faith, and of this the jury and not the Court are to judge from the evidence. See the cases of *Foster vs. Morris*, 3 A. K. Marshall, 611; *Lunsford vs. Turner*, 5 J. J. Marshall, 105. See also the case of *Swann vs. Wilson*, 1 A. K. Marshall, 99. On this as on other questions of real property, the Kentucky reports abound in illustrations and decisions. See, also, *Harbin vs. Roberts*, 33 Georgia, 48. It is pushing the doctrine of the sacredness of the rights of a landlord very far to say that if the land be sold as his, and the tenant, instead of resisting the sheriff, makes terms with the purchaser perhaps, to save his family from exposure to storm and cold, he is to be treated as a traitor to that fealty every tenant owes to his landlord. It is absurd to say that the landlord may recover against the tenant, backed as he is by the purchaser, and as soon as the recovery is had, the purchaser may come with the sheriff and formally put the landlord out and the tenant in. We think the tenant may show that he has attorned to the purchaser at the marshal's sale, and set up that title even if Smith be no actual party. But under our law we think the real owner has a right to be made a party, and to take the place of his tenant. It is nothing but his duty to his tenant, and it is his right for his own protection, since the tenant may care but little whether he is ousted or not, as his term may be nearly out.

We reverse the judgment, because the Court had no right himself to determine whether the defendant was tenant, and because we think the defendant, even if he was tenant when he went in, or purchased and took a bond, thus recognizing the plaintiff's intestate's title, and going in under it, can yet show that the land has been legally sold as the property of the vendor, since the date of his purchase, and that he has in good faith attorned to the purchaser at the marshal's or sheriff's sale.

Judgment reversed.

Flemister vs. The State of Georgia.

GEORGE FLEMISTER, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

Where the issue on a trial of an indictment for perjury was whether the defendant swore willfully, absolutely, knowingly and falsely, in swearing that he did not make and deliver a promissory note to the prosecutor, nor authorize any one else to make the note for him, and it was in evidence that the defendant could not read or write, and that the note was written and signed by a third party, though at the request of defendant, and read to him, it was error in the Court to refuse to permit the defendant to prove that "it was the understanding of the parties to the paper which was executed that the same was not intended as a note, but simply as a memorandum of an agreement to submit a controversy to arbitration."

Criminal law. Perjury. Evidence. Before Judge ROBINSON. Morgan Superior Court. September Adjourned Term, 1872.

George Flemister was placed on trial for the offense of perjury, alleged to have been committed on April 23d, 1872, before Joel C. Barnett, a Notary Public and *ex officio* Justice of the Peace, in the case of Jacob Reese against said Flemister, the same being a suit on a due bill made by the latter, in the following words :

"\$15 00. Due Jacob Reese fifteen (15) dollars for value received. This March 4th, 1872.

(Signed)

GEO. FLEMISTER."

The defendant was charged with having sworn willfully, knowingly, absolutely and falsely that he never signed nor delivered to said Reese the aforesaid due bill. The defendant pleaded not guilty.

Upon the trial, it appeared that the defendant was an illiterate man, unable to write, and that the due bill aforesaid was written by a third person at his request.

The balance of the testimony is unnecessary to an understanding of the decision.

The jury found the defendant guilty. A motion was made for a new trial upon the ground that the Court erred in re-

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fusing to allow the defendant to prove what was the understanding between the parties to said due bill, to-wit: that the same was not intended as a note, but simply as a memorandum of an agreement to submit a controversy to arbitration.

The motion was overruled and the defendant excepted.

BILLUPS & BROBSTON, for plaintiff in error:

FLEMING JORDAN, Solicitor General, for the State.

TRIPPE, Judge.

The indictment charges that the defendant swore that he did not make, sign or deliver the note. The State proved that it was executed by an agent, at defendant's request and in his presence. Defendant objected to this as being variant from the allegation in the indictment. In *Ellis vs. Francis*, 9 Georgia, 325, when the question was, whether a return on an execution of *nulla bona*, made by another person than the bailiff, but by his request and in his presence, he knowing the fact to be true, was a good and lawful return, this Court held that, "this return * * * may be considered as the act of the constable himself, as much so as if he had held the pen in his own hand," etc. So in *Reinhart vs. Miller*, 22 Georgia, 415, when the contract was signed by the brother for his sister, Casa Miller, and near where she was, it was said, "it was Casa Miller's own act, performed by her brother, by her command." We think this testimony was admissible.

The issue on trial was, did the defendant knowingly, willfully and absolutely swear falsely when he swore that he did not make or deliver the note, etc. It was in evidence that he was illiterate and could not read or write. It seems from the testimony for the prosecution that there was a dispute or contest between defendant and prosecutor at the time the note was given as to whether the former would pay the latter. It does not appear what the claim was, but it is evident there was some disagreement about it. The defendant offered to prove on the trial of the indictment, that "it was the under-

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standing of the parties to the pretended note that the same was not intended as a note, but simply as a memorandum of an agreement to submit a matter in controversy to arbitration." Ought he to have been allowed to have done this? The State had proven that a note was written and signed, read over to defendant and delivered by him to the prosecutor. Yet if it had been the understanding that the paper was not a note, that there was to be an arbitration about the controversy, and that this paper was in reference to that, to-wit: a memorandum, would not that have been competent on the doctrine of mistake, or that the defendant was in error as to what was done? It must be remembered that the perjury was assigned on testimony given in on a suit on that note; defendant had filed a plea of *non est factum*. It was sworn to and on the trial defendant under oath stated what has been above recited, on which the perjury is assigned. Had he on that trial proved what he now proposes to prove, to-wit: that he did not know it was a note, that neither party intended it as a note, but something else, and the Court credited the testimony, could a judgment on the note have been given against him? If it could not, and on this trial he proves all this and it is believed, can he be said to be guilty of perjury in swearing what he did? We only speak from what the record says he proposed to prove. If that evidence would probably have been of benefit to him he was entitled to it, particularly when taken in connection with the fact that he could not read or write.

Let the judgment be reversed and a new trial granted.

E. GUTHMAN, plaintiff in error, vs. M. T. CASTLEBERRY,
defendant in error.

When the landlord failed to repair the roof of the store-house, after notice of its leaky condition, and his tenant's goods were damaged thereby, the tenant is entitled to recoup the amount of such damages as against a distress warrant for the rent. (R.)

Landlord and tenant. Distress warrant. Recoupment.
Before Judge COWART. City Court of Atlanta. June Term,
1872.

For the facts of this case, see the decision.

S. WEIL, by A. W. HAMMOND & SON, for plaintiff in
error.

JACKSON & CLARKE, for defendant.

WARNER, Chief Justice.

The plaintiff, as landlord, sued out a distress warrant for rent due him by the defendant, which was levied on the defendant's property. The defendant filed an affidavit that the rent claimed by the plaintiff was not due. On the trial of the issue thus formed, the defendant offered to prove that the roof of the store-house rented was in a leaky condition, and that by reason thereof the defendant's goods had been damaged \$300 00. The plaintiff objected to this evidence, and the Court sustained the objection, unless it was shown that there was a pre-existing agreement that repairs should be made on the store-house before the defendant moved into it. Whereupon the defendant excepted.

The landlord is bound by law (independent of any pre-existing contract to that effect,) to keep the rented premises in repair: Code, 2258. If the landlord in this case failed to repair the roof of the store-house, after notice of its leaky condition, and the defendant's goods were damaged thereby, he was entitled to recoup such damages from the plaintiff, and have the same deducted out of the rent claimed to be due for the store-house, and if the damages sustained exceeded the amount of the rent claimed to be due, then the defendant did not owe the rent claimed: Code, sections 2858, 2859, 2861.

In our judgment, the evidence offered by the defendant was admissible, and it was error in rejecting it.

Let the judgment of the Court below be reversed.

Monroe *et al.* vs. Carter.

LORENZO D. MONROE *et al.*, plaintiffs in error, vs. RICHARD V. CARTER, defendant in error.

When there was a trial before a jury, on a warrant for forcible entry and detainer, and the entry and force by the defendant were admitted, but it was set up that the plaintiff was holding as the tenant of the defendant, and there was evidence upon both sides upon the point, in the main, by the parties themselves as witnesses, and the jury found for the plaintiffs, under a charge of the Court telling them that the case turned upon the nature of the plaintiff's holding, whether in his own right or as tenant, and the jury found for the plaintiff, this Court will not overrule the Court below in refusing to order a new trial unless the verdict be most manifestly contrary to the evidence.

Forcible entry and detainer, Possession. Before Judge HARRELL. Randolph Superior Court. November Term, 1872.

Richard V. Carter made affidavit before Thomas Coleman, Justice of the Peace, that Lorenzo D. Monroe and Eugenius L. Douglass had forcibly entered and detained a certain lot of land with a dwelling house and mill thereon in the county of Randolph, of which deponent had had the peaceable possession. A jury was regularly impaneled and the trial proceeded.

The plaintiff testified that he was in the quiet and peaceable possession of said property until January 6th, 1872. On that day he was absent from home, when the defendants took possession and placed a tenant in the dwelling and mill. The mill and house were both locked. They entered without the consent of the plaintiff.

The defendants testified that they were in possession of the property during the year 1871 and since; that plaintiff was on the land as their tenant; that they began business on the place on January 6th, 1872.

Whilst Eugenius L. Douglass was being examined, he was asked by counsel for the plaintiff if there was not a written agreement between plaintiff and defendants as to said property. He replied, that the deed to defendants was in writing,

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and plaintiff had a paper from them obligating defendants to reconvey on certain conditions, which he would be glad if plaintiff would produce; he did not think the agreement about the possession of the place was in writing.

By agreement of all parties the following instrument was introduced in evidence:

“GEORGIA—RANDOLPH COUNTY.

“This agreement made this 4th day of February, 1871, between L. D. Monroe and E. L. Douglass of the one part, and Richard V. Carter of the other part, all of the county and State aforesaid: witnesseth, that whereas, on the 2d day of January of this present year, (1871,) Richard V. Carter, by deed, conveyed to the parties of the first part, lot of land number forty-five, with half of lot number forty-six, lot of land number seventy, south half of lot of land number seventy-one and lot of land number eighty-two, all lying and being in the sixth district of originally Lee, now Randolph county; Now should the said Richard V. Carter, on the 1st day of January, 1872, or before that time, pay to said Lorenzo D. Monroe and E. L. Douglass \$1,252 81, with sixteen per centum interest thereon, and pay to Eugenius L. Douglas \$970 58, with seven per centum interest thereon to January 1st, 1872, or the time payment may be made, if made before that time, we the said L. D. Monroe and E. L. Douglass, bind ourselves to reconvey to said Richard V. Carter the lands with the appurtenances above mentioned and described.

(Signed)

“E. L. DOUGLASS.

“L. D. MONROE.”

Much conflicting testimony was introduced as to whether plaintiff, during the year 1871 and until the time when he claimed to have lost possession by the forcible entry of defendants, was in possession in his own right or as the tenant of defendants. The defendants sought to show an advance of money by them to the plaintiff, in consideration of which he agreed to hold the said property as their tenant. The evidence was excluded by the Court.

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The Court charged the jury, "that the only question to be submitted to and determined by the jury on the trial of forcible entry or forcible entry and detainer, is the possession and the force, without regard to the merit of the title on either side."

The jury returned a verdict for the plaintiff. The defendants filed their petition for *certiorari* alleging the exclusion of the evidence as to the advance of money and the charge of the Court, as error, which was sanctioned. After argument had, the writ of *certiorari* was dismissed and a new trial refused. To which ruling the defendants excepted upon each of the grounds aforesaid.

E. L. DOUGLASS; HERBERT FIELDER, for plaintiffs in error.

Possession is the only question of inquiry: Prince's Dig. 644; 4 Ga. R., 193.

HOOD & KIDDOO, for defendant.

1st. Force having been used in either entry or detainer, plaintiffs in error are guilty: 35 Ga. R., 100.

2d. Every unlawful entry is a forcible entry: 3 Brevard, 413; 4 Ga. R., 193; 12 E. C. L., 5; 9 Dana's R., 320; 2 B. Monroe, 300; 9 Yerger, 93, 317.

3d. The verdict being sustained by the evidence, will not be set aside, whether the charge was right or wrong: 32 Ga. R., 390.

MCCAY, Judge.

This is another case of a complaint to this Court of the refusal of a Judge to set aside a verdict of a jury on the facts.

The theory of our law is, that a jury shall pass upon facts. The jurisdiction of this Court only arises when the verdict is so shockingly contrary to the truth of the case, as it appears by the record, that the Judge has abused the power granted him by law to look into the facts and grant or refuse a new trial, accordingly as he shall think the jury have abused their right or not.

A *certiorari*, based on a charge of a verdict being contrary to evidence, stands on the same footing as a motion for a new trial, in this respect. Here, the magistrate told the jury distinctly that the question turned on the issue whether the plaintiff in the warrant, had been holding as the tenant of the defendants. There was evidence on both sides, and the decision, by the theory of our law, was with the jury.

Until the Legislature adopts some other mode of trying questions of facts than the trial by jury, it is the duty of the Courts not to interfere with their verdicts for any but very weighty reasons. Primarily, the duty to do that is with the Judge of the Superior Court, and the jurisdiction of this Court only arises when he fails in the performance of his duty. We do not think this is such a case, although the record does, in our opinion, show a stronger case for the plaintiffs in error than for their opponent. But it takes more than this to invoke the jurisdiction of this Court over the verdict of a jury, backed by the judgment of the Judge of the Superior Court.

Judgment affirmed.

JOSEPH SMITH, plaintiff in error, vs. T. J. MASON, tax collector, for use, etc., defendant in error.

Before the passage of the Act of August 24, 1872, there was no authority in any officer to transfer an execution for taxes so as to entitle the transferee to enforce the same by levy and sale of the property of the defendant.

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Illegality. Tax. Execution. Before Judge ROBINSON.
Jones Superior Court. April Term, 1872.

On December 7th, 1869, T. J. Mason, tax collector for the county of Jones, by his agent, Roland T. Ross, issued execution against Joseph Smith for \$139 55, the amount of his tax for the year 1869, and the costs. Upon this execution was a

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receipt to Smith for \$21 30, dated December 7th, 1869 ; also a receipt to Nathaniel S. Glover for \$118 75, the balance due, dated December 10th, 1869 ; also the following entry :

“For and in consideration of \$118 75, paid by Nathaniel S. Glover on this *fi. fa.*, I hereby transfer the same to him without recourse on me. December 10, 1869.

(Signed)

“R. T. Ross, Agent for
“T. J. MASON, T. C.”

On November 4th, 1871, the above execution, at the instance of Glover, was levied upon certain lands, the property of Smith. The latter filed an affidavit of illegality upon the grounds that the execution had been paid off, and that neither the tax collector nor his agent had authority to transfer the same.

Upon the trial of the issue thus formed, the defendant requested the Court to charge the jury that neither the tax collector nor his agent had authority to transfer the execution to a third person paying off the same ; that upon its payment by such third person, the tax collector's control over it ceased, and it could not be enforced against the property of the tax payer in the hands of any one. The Court refused to charge as requested, and charged directly to the contrary. To which charge, and refusal to charge, the defendant excepted. The jury found in favor of the plaintiff.

The defendant assigns error upon each of the grounds of exception aforesaid.

W. A. LOFTON, by Z. D. HARRISON, for plaintiff in error.

C. L. BARTLETT, for defendant.

TRIPPE, Judge.

The tax collector is an officer of the State to *collect* the taxes due from the tax payer. When this transfer was made of the tax execution, there was no statute allowing it to be done. Since then, an Act has been passed, August 24, 1872, giving to the officer whose duty it is to enforce the execution

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the power to transfer it to any person who pays it. It required the authority of the Legislature to grant the power. That Act defines what the transferee may do in enforcing his rights as such, and confers on him all that was possessed by the State. Without this Act, such an assignment could not be made. The collector was not the plaintiff, nor was he interested in the execution, nor does he come within the provisions or spirit of sections 3539, 3540, of the Code.

Judgment reversed.

JOHN DOE, *ex. dem.* MARTIN W. BRIDWELL *et al.*, administrators, plaintiffs in error, vs. RICHARD ROE, casual ejector, and FELIX BROWN, tenant in possession, defendants in error.

1. Where the issue was, whether or not the deed under which defendant held the land, failed by mistake to cover the number of feet actually sold, it was competent for a witness to testify that the lot was sold as it stood in the inclosure at the time. (R.)
2. It was competent for a witness to testify that plaintiffs' intestate had offered him the lot in his shoe shop for \$300 00, but the trade was not made then; that plaintiffs' intestate and the purchaser, under whom defendant held, then left, and the purchaser came back afterwards and told him he had bought the lot, but he had to throw in a pair of footed boots, the answer having been drawn out by plaintiffs, and tending to show the place where the sale was consummated. (R.)
3. It was competent for a witness to testify that plaintiffs' intestate, the purchaser and witness were on the lot together examining it previous to the consummation of the trade, that the lines were pointed out by plaintiffs' intestate, and marked by the fence then around it, as tending to show what was the intention of the parties to the contract, and whether there was either fraud or mistake in the execution of the deed. (R.)
4. A mistake in a deed, to be corrected, must have been made at the time of the execution. (R.)
5. The verdict was not contrary to the evidence. (R.)

Ejectment. Deed. Mistake. Evidence. New trial.
Before Judge HOPKINS. Fulton Superior Court. April
Term, 1872.

Birdwell *et al.* vs. Brown.

For the facts of this case, see the decision.

COLLIER, MYNATT & COLLIER, for plaintiffs in error.

1st. Proof necessary to establish mistake in deed. Gamble vs. Knott *et al.*, 40 Ga. R., 199; Adair vs. Adair, 38 *Ibid.*, 46; Wyche vs. Green, 16 *Ibid.*, 63; Administrator of Ligon vs. Rogers, 12 *Ibid.*, 288; Reese vs. Wyman *et al.*, 9 *Ibid.*, 436.

2d. Mistake must be made at time of execution. Reese vs. Wyman *et al.*, 9 Ga. R., 436; Administrator of Ligon vs. Rogers, 12 *Ibid.*, 288; Wyche and wife vs. Green, 16 *Ibid.*, 63.

3d. Verdict must show on which plea rendered. Code, sec. 3502; Tompkins vs. Covey, adm'r, 14 Ga. R., 119.

L. J. GLENN & SON, for defendant.

WARNER, Chief Justice.

1. This was an action of ejectment brought by the plaintiffs against the defendant to recover the possession of part of a city lot in the city of Atlanta. The defendant filed an equitable plea, setting forth that the premises in dispute had been sold by the plaintiffs' intestate, in the year 1853, to one Dubler, under whose title the defendant claimed, for the sum of \$300; that the lot, at the time of the purchase, was inclosed by a picket fence; that the plaintiffs' intestate sold to Dubler all the land included within that fence; that the deed to said premises was written by the plaintiffs' intestate through mistake, and described therein the line on a certain alley as being only fifty-one and one-half feet, when it should have been eighty-six feet; that the deed does not, in consequence of said mistake, speak the truth and intention of the parties to the contract. The only issue made and submitted to the jury on the trial, as certified by the presiding Judge, was as to the mistake in the deed, as alleged in the defendant's plea. The jury found a verdict for the defendant. The plaintiffs made a motion for a new trial, which was overruled, and the plaintiffs excepted. There was no error in admitting the answer of Eisenhurst to the question, "Was it (the lot) or not sold by Birdwell as it stood in the inclosure at the time?" This

was a circumstance going to show what was the intention of the parties at the time of making the contract. If the plaintiffs' intestate sold, and Dubler purchased all the land included within the picket fence, and the deed therefor specified a less number of feet than was actually embraced within the limits of the inclosure, the evidence was admissible as a circumstance from which the jury might infer that there was a mistake in the deed. The question for the jury to decide was, whether all the land included within the picket fence was sold, and if it was, did the deed speak the truth as to the number of feet sold, according to the contract and intention of the parties, or was the description of the number of feet mentioned in the deed inserted by mistake or fraud?

2. There was no error in admitting the answer of the witness, Eisenhurst, to the twenty-first cross-interrogatory put by the plaintiffs, in view of the facts disclosed in this record. The witness, in his direct examination, had testified as to the sale of the lot by Bridwell to Dubler, and as to the circumstances under which that sale was made. The witness had stated, on his direct examination, in connection with other facts attending the sale, that Bridwell had first induced him to go and see the lot and buy it, but as he did not care much about purchasing it, he induced his partner, Dubler, to buy it. Dubler took the lot, and he advanced the money to pay for it. To weaken the force of the testimony of the witness on his direct examination, in regard to the sale of the lot as embraced within the inclosure of the fence, the plaintiffs' counsel, on cross-examination, asked the witness, "Where was the trade made between Bridwell and Dubler?" "Bridwell offered me the lot, in my shoe shop, on Whitehall street, for \$300 00; the trade was not made there; they then left, and Dubler came back afterwards and told me he had bought the lot; I don't know what they said when they were out; Dubler said he had to throw in a pair of footed boots." The answer having been drawn out by the plaintiffs, we see no material error in the Court allowing him to answer it. The witness is merely stating his reasons for knowing where the trade was made.

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3. On the re-direct examination of the same witness, he was asked if, previous to the consummation of the trade between Dubler and Bridwell for the lot sued for, he and Dubler and Bridwell were on the lot, examining it, did Bridwell point the lines out, and if so, by what were they marked? The witness answered, "We were present on the lot, previous to the consummation of the trade, examining it; the lines were pointed out by Bridwell, and marked by the fence then around it." This evidence was also objected to, but, in our judgment, it was properly admitted, as going to show what was the intention of the parties to the contract, and relevant to the question of either fraud or mistake in the execution of the deed.

4. It is true that the mistake in the deed must have been made at the time of its execution, and, although the charge of the Court is not set forth in the record, we will presume that the Court charged the law correctly in relation to that point in the case, especially as no exception was taken to it.

5. There is a good deal of evidence in the record going to show that the words containing the number of feet, as expressed in the deed, was entirely inconsistent with the expressed intention of the parties at the time of the sale of the lot; the conduct of the parties thereto at the time, and the acquiescence of the plaintiffs' intestate for many years after the sale, added to the fact that Dubler, the purchaser, was an ignorant Dutchman, who could neither read nor write, we feel constrained to say, in view of all the facts disclosed by the record in this case, that there was no error in refusing the motion for a new trial.

Let the judgment of the Court below be affirmed.

HORTON & RIKEMAN, plaintiffs in error, vs. MORRIS KOHN,
defendant in error.

When a mortgage *fi. fa.* for the sale of a parcel of land was, under the orders of the plaintiff's attorney, levied on the land, and the same was sold at sheriff's sale, and the money raised applied to the *fi. fa.*, and subsequently, on a statement that the *fi. fa.* was lost, the plaintiff procured an alias *fi. fa.* to issue (taking no notice of the sale) and caused it to be again levied on the land, and a claim was interposed by one claiming under the defendant in the mortgage:

Held, That the claimant may attack the plaintiff's *fi. fa.* by showing that the orders had been complied with, and the land sold according to its commands, and that it was not competent for the plaintiff in reply to show that said sale was illegal, it having been made whilst there was a pending injunction prohibiting said *fi. fa.* from proceeding. The Court will not permit the plaintiff to set up his own wrong; said sale and the return thereof are existing facts, and until set aside by a proceeding for that purpose cannot be treated as null by the very party who thus disobeyed the order of the Chancellor.

Injunction. Illegal sale. Mortgage. Before Judge HARVEY. Floyd Superior Court. January Adjourned Term, 1872.

On October 30th, 1871, an alias mortgage execution in favor of Horton & Rikeman, against John G. McKenzie, was levied upon the west half of lot number forty-six, in the Coosa division of the city of Rome, with the improvements thereon, as the property of the defendant. A claim was filed to the land levied on by Morris Kohn. Upon the trial of the issue thus formed, the evidence made the following case:

On the 28th day of March, 1851, Alfred Shorter sold to John G. McKenzie lot number forty-six, in the Coosa division of the city of Rome, taking two notes, each for \$200 00, and giving his bond for titles. McKenzie paid on these notes at different times \$175 00. On the 21st of August, 1852, he sold one-half the lot to Felix B. Moyers. Shorter sued the aforesaid notes to judgment, and on the day of January, 1857, had the execution based thereon levied on said lot. On the 3d of February, of the same year, after the levy, he filed his deed in the clerk's office, conveying said property to

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McKenzie. The entire lot was sold under this levy, and Moyers became the purchaser for \$317 00. He paid to the sheriff his bid and received a deed.

On the 10th of February, 1853, McKenzie executed a mortgage on the property levied on to Horton & Rikeman, to secure the payment of \$600 00. This instrument was recorded on March 19th, 1853. Proceedings were instituted to foreclose this mortgage, and on February 10th, 1857, a rule absolute was taken. On April 1st, of the same year, the mortgage execution was levied on the property in dispute. Moyers filed his bill against Horton & Rikeman, and Thomas S. Price, the deputy sheriff making the levy, praying that the writ of injunction may issue restraining any further proceeding on said levy. The bill was sanctioned on June 29th, 1857, and the writ of injunction issued in accordance with the prayer. On December 11th, 1867, an alias mortgage execution was issued. On the 3d of March, 1868, under the directions of plaintiffs' attorneys, the injunction still pending, the land in dispute was sold at sheriff's sale under said execution, and purchased by Daniel S. Printup for \$30 00. The proceeds of the sale was applied to the satisfaction of the process under which the property was sold. On the 27th of March, 1868, the bill upon which the injunction aforesaid issued, was dismissed for want of prosecution. On October 24th, 1871, the claimant being in possession of the property in dispute, a second alias execution was issued at the instance of Printup, and levied on the 30th day of the same month.

The evidence was voluminous, but the above statement is all that is necessary to an understanding of the decision.

The Court charged the jury as follows: "If you should find that this same property was sold by the order of the plaintiffs or their attorneys, under the mortgage *fi. fa.* and said *fi. fa.* took the proceeds of the sale, or its share of it, it divested the mortgage lien until the sale should be set aside, and in order to set it aside and resell, so as to conclude the rights of persons not holding under McKenzie, the defendant in *fi. fa.*, or deriving title through or from those who did hold under

him, such persons who have any rights that would be affected by the resale, must have had notice of the proceeding to order a new sale. (The subsequent order for the last alias *fi. fa.* to issue not being sufficient to conclude the rights of any but the defendant in *fi. fa.* and those in privity with his title.) Even if the plaintiffs were enjoined at the time of the sale that would not alter the case, as they would be estopped from saying the sale made by them was void."

The jury returned a verdict finding the property not subject.

The plaintiffs moved for a new trial upon the ground, amongst others, of error in the aforesaid charge. The motion was overruled and plaintiffs excepted.

UNDERWOOD & ROWELL; PRINTUP & FOUCHE, for plaintiffs in error.

DUNLAP SCOTT, for defendant.

MCCAY, Judge.

It is not necessary to discuss many of the points so elaborately insisted on in the argument of this case. If the charge of the Court, as to the effect of the previous sale upon the *fi. fa.* is right, there is no error in the judgment refusing a new trial. In common language we call a process of this sort a *fi. fa.* but it is in fact an *order* to the sheriff to seize and sell a *particular parcel* of land. This the proof showed the sheriff had done. That the plaintiff's attorney had directed him to levy the *fi. fa.* on the land, that he had done so, advertised and sold it, and that the proceeds had been applied to the mortgage *fi. fa.* *Prima facie*, this was a complete exhausting of the functions of the mortgage *fi. fa.* Its orders had been fully obeyed. The land it ordered sold had been all sold, and it could no longer proceed. It was *functus officio*. In reply to this it was insisted that this sale, though made under the directions of the plaintiff, was void, that at the time of the sale there was pending in Floyd Superior Court a

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bill in equity in favor of Moyers, enjoining the plaintiff from selling this land by virtue of said mortgage *fi. fa.*, that therefore, in thus selling the land, he was disobeying the injunction, acting illegally, in contempt of the injunction, and that the whole proceeding was therefore void.

We do not at present decide whether or not this is so. We incline to think that the plaintiff in the bill and those claiming under him, may insist upon its illegality and invalidity. But it is not in the mouth of the plaintiff in the *fi. fa.* to come thus collaterally into a Court and plead the *illegality* of his own acts. We do not say he is estopped, in the sense of that rule which estops a man from denying the validity of an act or statement of his, under which a third person has paid out money, or put himself in a position where it would be a fraud upon him to permit the other to repudiate his act.

The ground of this case is, that one will not be allowed to assert in a Court that his own act was a *violation of law*.

This levy and sale are existing facts. They actually took place. Whether they are void or not may depend on the opinion of Moyers, or those claiming under him, or, perhaps, on the discretion of the Chancellor whose order was disobeyed. At any rate, we think the plaintiff cannot say they are void until there has been a proceeding to set them aside. This has never been done. It is absurd to say that the order for the alias *fi. fa.* does this. The issue was not made before the Judge. Not only did the order pass without notice, but there was nothing in the papers even calling the attention of the Court to the fact. It was simply ignored.

We think, therefore, the Court was right in his charge on this point, and if so, the issue was properly found by the jury for the claimant.

Judgment affirmed.

RICHMOND A. REID, plaintiff in error, vs. JOHN B. WHITFIELD et al., defendants in error.

1. Where several grounds are taken in a motion for a new trial, and the Court grants the motion, without stating on what ground, if there be any one of the grounds on which, if the Court had rested its judgment, this Court would not interfere, the order granting the new trial will be allowed to stand.
2. Where the plea of payment is filed, and the evidence is conflicting whether a check given by one of the defendants was accepted in payment of the debt sued on, and the Court grants a new trial on the ground, amongst others, that the verdict is against the weight of the evidence, this Court will not interfere with the discretion of the Judge so granting the new trial, unless the evidence be so strongly in favor of the verdict as to show an abuse of that discretion.

New trial. Payment. Before Judge ROBINSON. Jasper Superior Court. August Term, 1872.

Richmond A. Reid brought complaint against John B. Whitfield and Elbert W. Baynes upon the following note:

"On or before the 3d day of November next, we or either of us promise to pay H. J. Dennis or bearer two hundred and seventy-five dollars, for value received. October 20th, 1868.

(Signed)

"J. B. WHITFIELD,

"E. W. BAYNES, security."

The defendants pleaded the general issue and payment; and the security the further fact that his signature to said note was obtained by misrepresentations.

The evidence made the following case: Whitfield gave the note sued on in part payment for a horse. Dennis and Reid were selling horses together. The former stated to Whitfield that his cash price for the horse was \$275 00; if he credited any one he knew well, his price would be \$300 00; but if he sold the animal to him on time, he must pay \$325 00, and must give security for \$275 00 of this amount. Baynes agreed to stand security for this last amount. The evidence is conflicting as to whether Baynes believed this sum to be the entire price of the horse, or whether he was informed as to the

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fact that Whitfield was to give his individual note for an additional \$50 00. Whitfield gave to plaintiff, on March 22d, 1869, the following order :

“\$335 00. Mr. John F. Patterson, executor of Mathew Whitfield, deceased, will please pay Richmond A. Reid or bearer, three hundred and thirty-five dollars, on two notes he holds against me, and oblige, yours, etc.

(Signed)

“JOHN B. WHITFIELD.”

Plaintiff required that an additional \$10 00 should be embraced in this draft to cover the interest on the notes. The evidence is conflicting as to whether this order was given in payment of, or as collateral security for the notes. Whitfield had seen Patterson and made arrangements for the payment of the order. He had given to Patterson his receipt for \$326 82, and it had been allowed him in his returns as executor. Neither the notes nor the order had been paid.

The jury returned a verdict for the plaintiff against both defendants, for the full amount of the note sued on, principal and interest. The defendants moved for a new trial, because the verdict was contrary to the law and the evidence. The motion was sustained, and the plaintiff excepted.

FLEMING JORDAN ; KEY & PRESTON, for plaintiff in error.

C. L. BARTLETT, for the defendant.

TRIPPE, Judge.

The motion for a new trial recited several grounds, and was granted by the Court without specifying the ground on which it was allowed. An examination of the testimony will show that it was strongly conflicting on the point whether the check drawn by Whitfield on the executors of his grand-father was accepted by plaintiff in payment of the note. Both of the defendants say it was. Baynes states that before it was given the plaintiff agreed so to take it; that he put himself to some trouble to have the check drawn, and after plaintiff got it he told Baynes it was satisfactory. The plaintiff says it was

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taken as collateral security. The Judge who tried the case was not satisfied with the verdict, which was for the plaintiff, and we do not feel compelled to hold that he abused his discretion.

Judgment affirmed.

THOMAS KILE, plaintiff in error, vs. JOHN G. JOHNSON, defendant in error.

1. Where a note for \$1,488 00 was made in 1864, and after the conclusion of the late war, was stamped with a five cent revenue stamp, the holder estimating it as worth \$100 00, it was properly admitted in evidence. (R.)
2. Under these circumstances, it was not error to admit evidence under which the plaintiff might recover more than \$100 00 on the note. (R.)
3. This being a Confederate contract, it was the province of the jury to adjust the equities between the parties under the evidence in the case, which being fairly done under the law applicable to such contracts, this Court will not interfere. (R.)

Stamps. Evidence. New trial. Ordinance of 1865. Before Judge HOPKINS. Fulton Superior Court. April Term, 1872.

Johnson brought complaint against Kile on an account for twenty boxes of tobacco, weighing twenty-one hundred pounds, alleged to be worth \$3,150 00, with interest from June 12th, 1864, and on a due bill for \$1,488 00, dated June 15th, 1864. The record fails to disclose the plea of defendant.

The following evidence was introduced on the trial:

John G. Johnson, the plaintiff, sworn: The debt, the subject matter of this suit, has been regularly given in for taxes, and the taxes on it paid, except for the year 1865, and no taxes were required to be paid for that year. Plaintiff only placed a five cent revenue stamp on the note, as he did not regard it as worth more than \$100 00. In 1864, sold to defendant twenty boxes of tobacco for \$6,000 00 in Confederate

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money. Defendant paid him between \$1,800 00 and \$2,000 00, in Confederate Treasury notes, and turned over as collateral security, twenty-eight seven-thirty notes or bonds, to secure the payment of \$2,800 00, and gave his note for the remainder of the purchase money, \$1,400 00. The reason plaintiff would not receive the notes or bonds as payment, was because he wanted the "new issue," and these notes or bonds were only worth sixty-six and two-thirds cents in the dollar, and had to be funded in four per cent. certificates by a given time, or depreciate one-third in value. Besides, defendant told plaintiff he wished to get them back, as they were interest bearing notes. The tobacco, since the war, would have been worth from seventy-five cents to one dollar per pound. Tendered these notes back just before this suit was commenced.

The due bill sued on was placed in evidence, having on it a five cent revenue stamp.

Thomas Kile, the defendant, testified as follows: In 1864, bought of plaintiff two boxes of tobacco, and paid him about \$4,800 00 in Confederate money, and gave his (defendant's) note for the balance. The seven-thirty notes were not given as collateral security, but were delivered in part payment. These notes were worth as much as the new issue, and the only effect the Funding Act had, was to make them worth a premium. Might have said to the plaintiff at the time he paid them to him, that he would give him new issue for them when he got it, or that he wanted to keep them because they were interest bearing notes. This was a Confederate transaction, and at the time \$1 00 in gold was worth from \$19 00 to \$20 00 in Confederate money.

Four witnesses testified that the seven-thirty notes or bonds were not included in the Act requiring what was known as the old issue, to be funded within a specified time. At all times these notes were at par, and worth fully as much as the new issue.

Barber's tables were, by consent, considered in evidence, by which from June 1st, to July 15th, 1864, \$1 00 in gold was worth \$18 00 in Confederate money.

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The jury returned a verdict for the plaintiff for \$258 00 principal, and \$139 55 interest.

The defendant moved for a new trial upon the following grounds:

1st. Because the Court erred in admitting in evidence the note, having but a five cent revenue stamp thereon, the defendant objecting thereto.

2d. Because the Court erred in admitting, over the objection of defendant's counsel, evidence which would authorize the jury to find more than \$100 00 as due on the note.

3d. Because the verdict was contrary to the evidence.

The motion was overruled, and the defendant excepted upon each of the grounds aforesaid.

M. J. IVEY; L. J. WINN, for plaintiff in error.

E. N. BROYLES, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant, to recover the value of a note given by the defendant to the plaintiff for tobacco, dated 12th June, 1864, and also containing a count in the declaration for the value of the tobacco.

On the trial of the case, the jury found a verdict for the plaintiff. A motion was made for a new trial on the several grounds set forth in the record, which was overruled, and the defendant excepted. There was no error in admitting the note in evidence to the jury. It had a revenue stamp on it, as required by the United States revenue law, for the value at which the plaintiff estimated it to be worth. There was no error in admitting evidence going to show that the plaintiff was entitled to recover for the note and the tobacco more than \$100 00. It is true that the plaintiff stated that he valued the note at \$100 00 when he put a revenue stamp on it, but that was a circumstance to be considered by the jury in connection with the other evidence in the case. It was not *conclusive* as to his right to recover more than that amount.

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This was a Confederate contract, and it was the province of the jury to adjust the equities between the parties under the evidence in the case, which, in our judgment, they have fairly done under the law applicable to such contracts. Whether the seven-thirty notes or bonds were received by the plaintiff in payment of the tobacco, or only as collateral security, the evidence is conflicting. The jury, however, thought proper to believe the plaintiff instead of the defendant, as it was their privilege to do.

Let the judgment of the Court below be affirmed.

MYRON D. WOOD, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. A married man, known by a female of ordinary sense to be such, may be guilty of the crime of seducing said female, but under section 4305 of the Revised Code, which provides that any person, who, by persuasion and *promise of marriage*, or other false and fraudulent means, shall seduce, etc., a married man, known by the woman to be such, cannot, if she be a woman of ordinary sense, be guilty of seducing her by "persuasion and promise of marriage."
2. Whilst we recognize the law to be that a married man, known to be such by the woman seduced, may be guilty of seduction by other false and fraudulent means than by persuasion and promise of marriage, yet a count, in an indictment which charges seduction by false and fraudulent means, and sets forth as one of such means a promise of marriage made by a married man to an unmarried female of ordinary sense, who knows he is married, is not a good count, unless it also contain charges of other means, false and fraudulent, sufficient in themselves to constitute the offense, and said count, though then a good count, is only so because of the charge of said other false and fraudulent acts.
3. A charge of seduction which sets forth that the defendant was a teacher of a school and the girl seduced his pupil, a minister of the gospel and the girl a member of the church of which he was the pastor, that he told her he loved her, that she was congenial with him, that he had prayed over their relations, and that it would not be wrong for her to submit her person to him, by means of which, etc., is a good charge.
4. The guilt of the accused will depend on the proof and on the actual influence under all the facts, including the several characters of each,

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and her confidence in him and the effect which such statements had in truth upon the girl.

5. On the trial of an indictment for seduction, it was error in the Court to charge the jury that whilst the woman seduced must be a virtuous, unmarried female, yet the test of her virtue was whether she had or had not before that time ever had illegal sexual intercourse with a man.*

6. When, on a trial for seduction, the female alleged to have been seduced was the sole witness to the principal facts, and in her evidence she declared that for two years after the alleged seduction before the trial, she had lived a life disclosing great moral turpitude, hypocrisy, and the Court was asked, in writing, to charge the jury that one ground for disbelieving a female witness was, that if the witness disclosed in her testimony acts done by her and habits of life pursued by her which exhibit moral turpitude in herself, and the Judge refused:

Held, That this was error, and the fact that the prisoner on trial is charged to have been the cause of said acts, and to have joined in them does not alter the rule.

7. If a written request be made to charge, legal in its terms and pertinent to the matter on trial, it is the duty of the Court to charge at least the substance of it; it is not enough, if by inference it may be covered by some other charge, unless that inference be very plain and noticeable.

8. On a trial for seduction, acts, and sayings between the parties, bearing upon the principal fact, both before, at the time of, and after, are admissible in evidence as inducement, as part of the *res gestæ*, and as explanatory and in mitigation or exculpation of the principal fact.

9. Under an indictment for seduction, it is competent for the jury to find the defendant guilty of adultery or adultery and fornication, if the proof would justify it. Seduction is the higher offense, and necessarily makes the other, and it was error in the Judge on the written request of the defendant's counsel to refuse to point out to the jury in his charge the difference between these offenses.

WARNER, Chief Justice, dissented.

Criminal law. Seduction. Indictment. Presumption. Witness. Charge of Court. *Res gestæ*. Adultery and fornication. Before Judge HOPKINS. DeKalb Superior Court. March Term, 1872.

*TRIPPE, Judge, dissented from McCAY, Judge, on this proposition as follows: "It was not error for the Court to charge, 'The presumption of law is that the female alleged to have been seduced was virtuous, and that presumption remains until removed by proof. She must have personal chastity. If she at the time of the alleged seduction had never had unlawful intercourse with man, if no man had then carnally known her, she was a virtuous female within the meaning of the law. If man had then carnally known her, had had carnal intercourse with her, she is not a virtuous female within the meaning of the law.'"

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Myron D. Wood was placed on trial for the offense of seduction. The indictment contained three counts. The first alleged "that the said Myron D. Wood, in the county aforesaid, on June 27th, 1868, did, by persuasion and promise of marriage, to-wit: by then and there promising to marry one Emma I. Chivers, when his, the said Myron D. Wood's wife, to whom he was then married, should die, he, the said Myron D. Wood, then and there declaring and stating to said Emma I. Chivers, that his, the said Myron D. Wood's wife, to whom he was then and there married as aforesaid, was in bad health and would not live long, and that he, the said Myron D. Wood, loved her, the said Emma I. Chivers, better than any other woman living, that he thought that she, the said Emma I. Chivers, and he, the said Myron D. Wood, were congenial, and that they, the said Myron D. Wood and the said Emma I. Chivers, would marry as soon as his said wife should die, and he, the said Myron D. Wood, then and there persuaded the said Emma I. Chivers to yield herself to his lustful embraces, and to allow him to have carnal knowledge of her, the said Emma I. Chivers, by telling her, the said Emma I. Chivers, that it was not wrong for her to yield herself to him, and that his passion for her was pure and holy, and the said Myron D. Wood, then and there, by the promise of marriage and persuasion as aforesaid, did seduce her, the said Emma I. Chivers, she then and there being a virtuous, unmarried female, and did then and there, induce her, the said Emma I. Chivers, to yield to his lustful embraces," etc.

The second alleged that he, the said Myron D. Wood, "did, by false and fraudulent means, seduce one Emma I. Chivers, she then and there being a virtuous, unmarried female, and induce her to yield to his lustful embraces, and allow him, the said Myron D. Wood, to have carnal knowledge of her, the said Emma I. Chivers, to-wit: by then and there promising to marry her, the said Emma I. Chivers, when his, the said Myron D. Wood's then wife, should die, and that his wife could not live long, and was in bad health, and that he,

the said Myron D. Wood, loved her, the said Emma I. Chivers, better than any woman living, and that his, the said Myron D. Wood's present wife, was only so in name, and that he and his said wife were not congenial, and that it was not wrong for her, the said Emma I. Chivers, to yield herself to him, the said Myron D. Wood, as he and she, the said Emma I. Chivers, were congenial; that he, the said Myron D. Wood, had made it (her yielding herself to him) the subject of prayer to God; and that it was not wrong for her to do so, as his wife, then married to him, would die soon, and they, the said Myron D. Wood and Emma I. Chivers, would then marry, and that his, the said Myron D. Wood's, passion for her was pure and holy, and that he, said Myron D. Wood, would not harm her, the said Emma I. Chivers; he, the said Myron D. Wood, when making said promises of marriage, and using said persuasions, and said false and fraudulent means to seduce her, the said Emma I. Chivers, being then and there a minister of the gospel, and her pastor, and her preceptor in school, and by means of such persuasions and promises of marriage, and by the false and fraudulent means used by the said Myron D. Wood as aforesaid, did then and there induce her, the said Emma I. Chivers, to yield to his lustful embraces, and allow him, the said Myron D. Wood, to have carnal knowledge of her, the said Emma I. Chivers," etc.

The third alleged that the said Myron D. Wood "did, by persuasion and promises of marriage, and by other false and fraudulent means, seduce one Emma I. Chivers, then and there being a virtuous, unmarried female, and the said Myron D. Wood, then and there, by persuasions and promise of marriage, and other false and fraudulent means, to-wit: that he, the said Myron D. Wood, loved her, the said Emma I. Chivers, better than any other woman alive, and that it was not wrong for her, the said Emma I. Chivers, to yield herself to him, and that his then present wife was only so in name, and that she, his then present wife, would not live long; that he thought that she, the said Emma I. Chivers, and he, the said Myron D. Wood, were congenial—he, the said Myron

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D. Wood, when using said persuasion and making such promises of marriage, and using said false and fraudulent means to seduce her, the said Emma I. Chivers, being then and there a minister of the gospel, and her pastor and her preceptor in school, and by means of such persuasion and promises of marriage, and by the false and fraudulent means used by the said Myron D. Wood as aforesaid, did then and there induce her, the said Emma I. Chivers, to yield to his lustful embraces," etc.

The defendant filed a special plea in bar of said indictment, as follows:

"That at the time the offense charged in said indictment is alleged to have been committed, the defendant was a married man, and was then living and cohabiting with his lawful wife, and had been so living and cohabiting with his lawful wife for more than eleven years; that he then had, and at the time the offense is alleged to have been committed, did have a lawful wife and three children, with whom he was then, and at the time of the trial, still living, all of which facts, stated in said plea, were well known to Emma I. Chivers, the female alleged to have been seduced. At the time of the alleged seduction, and for several years previous thereto, the said Emma I. Chivers being then and there a matured woman of about nineteen years of age, of sound sense and discretion, and of good education, and who was then and there well acquainted with the family of the defendant, and who could not have been a party to a contract of marriage with the defendant, and to whom the defendant could not have made a valid or lawful promise of marriage."

The Solicitor General demurred to the plea. The demurrer was sustained, and the defendant excepted.

The case went to the jury upon the plea of not guilty.

The following evidence was introduced:

FOR THE STATE.

EMMA I. CHIVERS, sworn: My name is Emma I. Chivers; I live in Decatur, DeKalb county; I have lived here since I

was a child ; I am twenty-one years old ; I am acquainted with the defendant, Myron D. Wood ; I knew him before he was here as pastor, when he lived in Yorkville, South Carolina, when he came to visit here ; I am not certain, but think he came here in July of 1866 ; he taught school in 1867 ; he brought his family in 1867 ; I knew him then ; he was a preacher of the gospel—a Presbyterian preacher ; he had charge of a Presbyterian church ; he taught a school—a mixed school—male and female ; I was living over across the railroad when he came ; we moved from there in the fall of 1867, I think in October, to a house between Mr. Wood's house and Mr. Winn's ; I don't know how far from Mr. Wood's ; nearer to Winn's than Wood's house ; I was fifteen, going on sixteen, in 1866 ; in 1867, I commenced going to school to Mr. Wood ; I did not go to school to him when living at the big house, near depot ; I began when we moved over to the house between Wood's and Winn's ; I don't think we lived there quite a year ; we moved then to Mr. Wood's, into his family ; Mr. Wood said to mother, he wanted me to go, so he could better instruct me, and she could do the work in the family if she would ; it was at his suggestion that we moved to his house ; I did belong to the church ; I joined in 1866—in March, I think ; Mr. Burkhead was pastor then ; I think in March, 1866, I joined the Presbyterian church ; there is one Presbyterian church here ; that is the same church that Mr. Wood was pastor of ; the first time he ever took any liberties with me, I was going to school ; first time I noticed that he cared particularly for me ; if I passed him he would smile very kindly ; then he would give me little presents, such as candy and grapes ; he seemed to take a good deal of notice of me ; then he asked mother to put me under his charge ; he would not charge tuition for me, as I had no means to pay, as I had no father ; he said he wanted to raise me as a daughter ; he wanted to just raise me his way ; that the intellect I had he wanted to cultivate ; he knew mother's ambition was for me to be a first class teacher ; he said if she would keep young men from visiting me— (Testimony objected to by defendant's counsel ;

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“no such charges in indictment.” Objection overruled.) Mr. Wood told mother to place me under his charge; that I had a great many studies, and he thought young men would distract my attention, and he wanted her to say to them, “I had rather not receive young men’s company;” I was young, and he wished her to pledge that the young men should be kept away; and then young men began to think it strange of me refusing their company; my mother agreed to do as he wished; I continued going to school to him; whenever he saw me do anything likely to produce remark, he told me kindly of it, and said he wished me to avoid anything that was wrong; I tried to do all I could to please him, seeing he was so kind and good, and when he told me to do anything, I thought it my duty to do it; sometimes when I started from school, he would go with me; we passed home by Mr. Mason’s; sometimes he would walk with me towards home; he would compliment me; I thought he was good and kind to me; I thought it was all right, I did not suspect anything wrong by it. He told me that I must have known that I was his favorite in school; he said one of the young ladies asked who was his favorite. (Defendant’s counsel object: “We find nothing in the indictment of this sort, and wish the proof confined to the charges in the indictment.” Judge: “Consider the testimony in, till witness is through, then you can point out special objections, what it is you object to, or object as we go along, as you please, but there can be no conviction on anything but what is in that indictment.”) Mr. Wood said he reckoned I knew I was his favorite; he wanted me to trust him wholly; he wanted to keep me from annoyance as I had no one to depend on; he talked that way. He told me one day, that he had something particular to tell me, he wanted me to meet him at Mrs. Morgan’s, to stay there till after school, that he had some writing to do, and for me to stay till about nine o’clock, and not to leave till he was down there; he said that Clinton Ballinger was staying there, and for me not to encourage him to go home with me; that he (Wood) wanted to escort me home, that he wanted to have a long talk with me; he wanted

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to go home with me himself, he would come down after me and escort me home; I staid there and Mr. Ballinger said he would go up to the school house, where Mr. Wood was, and would be back directly; we sat and talked, and after awhile he and Mr. Wood came back to Mrs. Morgan's; I got up to go; then Mr. Wood said, "Miss Emma, you are going my way, you need not trouble Mr. Ballinger to go, I will go with you." We came out of Mrs. Morgan's, and came down by Mr. Kirkpatrick's shop and turned and went down the street to the end, then turned to the left, then turned to the left again by the Presbyterian church, towards Mr. Wood's house; he talked to me and said how much he loved me; that we were congenial; he had never met with any one that he took so much interest in as he did in me; he had a secret he would like to tell me, if we were more intimate than we were at that time; he asked me if I would consent to let him have access to my person; he thought it would not be wrong; I might think it was wrong for young men, but it would not be wrong for him; he loved me; it was not lust; his love was pure; he took so much interest in me; he said he had married when he was young; when he became a minister the professors had advised him to marry; that all ministers ought to have wives, and Miss Beck (now Mrs. Wood) was the only woman he loved; he though he loved her then; he asked her to marry, and they were married; he loved her better than any other woman till he saw me; he had tried to live happy but their feelings were not congenial; when he saw me he knew he could safely trust me in anything, and wanted me to give him my entire confidence; there was no happiness for him; there were many difficulties between him and his wife he would tell me of if I allowed him to become intimate with me; when we got by the lane, near his house, between his house and a lot, he stopped and caught my hands and held me and told me to decide; and to return his love; I cried very hard; I did not know what he meant; I was bewildered; he said he would not hurt my feelings for the world; he put his arm around me; he said he would not harm me; how much he loved me; all this he



thought of before ; he knew it was not wrong ; he made it a subject of prayer ; had prayed to be directed right ; his conscience did not smite him for the course he was taking ; he believed if it had been wrong, providence would interfere some way to prevent it ; he had that confidence in God ; he believed some obstacles would have been in the way of our intimacy ; he felt of my person ; I cried and tried to get away from him ; we went on towards Mr. Mason's ; he talked to me and said his wife did not love him and refused to have anything to do with him ; he had no one in whom he could place confidence, and begged me to trust him wholly, and not to be so reserved ; that I must know if he did anything wrong it would hurt him as much as me ; I might know he would not injure himself ; he told me then he never could love another one as he loved me ; I felt sorry for him and that he was not treated right ; I thought it (further intimacy) was wrong ; I thought if I could do anything for him I ought to do it ; as we came on home he asked me if I would allow the same privilege again ; I would not consent ; I was sick ; I said, "please let me go home ;" I was so bewildered ; he kept talking ; he seemed so sad that I had no confidence in him ; when we got to the gate he said, "Emma, you will kiss me ;" I held down my head ; I was crying ; I did not know hardly what I was doing ; he caught me in his arms and kissed me ; I ran into the house ; I thought about it ; I cried about it ; I thought it was me that did not know about its being right or not ; the road we went was not the nearest way home ; he said he had a heap to talk with me ; he wanted to have a long talk with me ; next morning he wrote a letter and handed it to me in school and told me he did not mean no harm ; if he had taken liberties he wanted me to pardon him ; he would do so no more ; I thought he spoke so kind I thought it was wrong, as he was so much my superior ; I thought he knew better than I did what was right or wrong ; I told him I did not have hard feelings towards him ; he sometimes came after he had been to Atlanta ; he would come and sit with me ; first time he had intercourse was when he had been to Atlanta ; he told me to sit up wait-

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ing for him, and he would come back and come to my house ; I sat up and waited for him ; he came in and sat down, showing me something about my lessons ; he said he was feeling bad with head-ache ; he asked if I objected to him lying on the bed ; I said no, if he was sick he ought to lie down ; he lay down on the bed a while ; he talked to me, then he said, "Emma, come and sit by me and rub my head ;" I sat on the bed, reclining on my elbow ; I rubbed his head ; he kept talking to me, then he asked me if I would object to him being intimate ; he told me how much he loved me ; he knew it was not anything wrong ; it was not lust ; his feelings were pure and good ; then he put his arms around me, kissed me, and hugged me, and had intercourse with me then ; he told me he wanted to marry me, and I need not think it was anything wrong ; he intended to marry me some day ; his wife was sick, she could not live long, she would die in two years, if not sooner ; I said he told me he would marry me ; that was in 1868 ; that was before he had intercourse with me ; he told me that he would marry me, both before and after the intercourse ; he told me that several times before ; he got me a ring—a gold ring ; he said that would be a bond between us ; he intended to keep his promise, and that would be a bond between us ; that was after the intercourse. (Counsel for defense : "We hope this will be ruled out. We object to all that took place after the alleged seduction." Judge : "No promise made after the alleged offense can be given in evidence. Everything that occurred between them, either before or after, may go in evidence to throw light on the whole transaction.") He gave me the ring after the intercourse ; that night he told me he intended to give me a ring before the intercourse ; he gave me the ring afterwards ; I do not remember how long after ; it was next time after he went to Atlanta. (Defendant's counsel : "Please your Honor, is this within the rulings of the Court?" Judge : "Yes, sir.") I gave him the ring back just before I left his house. (Why ?) He fell out with me ; he did not want me to leave his house and go away ; he said he would take the ring and destroy it ; he said he threw it in the well at his house ; the

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intercourse was at our house; he had more connection with me there. (Defendant's counsel objected. Overruled.) I don't know when was next connection, or how long it was; we did not live very long at that house after the connection; we did not have connection a great many times at that house; we moved from there to Mr. Wood's house; he told me he wanted me to go to his house, so he could instruct me better, and look over me better; it was more convenient to instruct me in my lessons; he wanted me to go to his house and not be separate from him; my mother went with me; I boarded at his house for a while; I went to school during that time to him. (Was there anything improper there?) Yes, sir; that was in the latter part of 1868, soon after I went; it was done in his study; it was up stairs when we first went there; there is a passage two or three feet wide; his study was across from my room; I do not know how often; as often as he could get a chance to be with me; he came in his study and stayed there, and would call me in; I stayed in my room across the passage; he would tell me beforehand that he wanted me to come to his study; I took my books as if to study; sat in the study awhile; mother thought he was assisting me with my lessons; my mother was cooking for Mr. Wood at that time; I don't remember how often he had intercourse with me at that house; we lived there about a year and a quarter; we went in 1868, latter part of summer, and left there in latter part of 1869; during the time I was there he had intercourse with me; from there I moved home to the house by the railroad; I lived with my mother and sister at home; I have no father living; father died in 1858. (Who lived at that house?) Mother, my sister and I; sister is younger than I; I do not know how many times we had intercourse after we moved home, but several times; I remember one time in the front room at our house; only once or twice in our own house. (How many times did he make promise of marriage before the first time of intercourse?) I do not know how often; I know it was two or three times; (Why did you yield to him?) The reason was I thought

he would not do anything wrong, because he was such a good man, preacher, pastor, my teacher; I never had seen or known him do anything wrong; he was so much my superior, he would direct me right, even if I had scruples as to what was right or wrong; I thought he ought to know better than I did; he ought to know better than I what was right or wrong. (What was the influence or motive that led you to yield to him?) Because he was my pastor, and as I thought he was so noble and pure; I had every confidence in him as he was my pastor and teacher; I had perfect confidence in him; I thought everything he said was right; if he told me it was not wrong I thought it was not wrong; I was eighteen at the time; I thought he would marry me when Mrs. Wood died; I knew she was not in good health and I thought that of course he would marry me if she died; I had seen her and knew she was not in good health; I firmly believed he would marry me; I have a child. (Who is father of that child?) (Question objected to; question allowed.) Mr. Wood—Myron D. Wood—is father of that child. (Had any other man ever had intercourse with you before defendant?) Never any young man, no male person ever had intercourse with me but Myron D. Wood. (Where is the child?) In Ordinary's office. (Defendant's counsel object to the exhibition of the child to the jury, a child born two years after the alleged offense. Judge says: "All such testimony has been ruled out." The child cannot be used for such a purpose.) All these transactions took place in DeKalb county; I have never been married.

Cross-examined: I am twenty-one years old; I have lived in Decatur since I was a little child; I don't know when I came, nor what year; my age is recorded; I speak from a record; I suppose my parents know when I was born; I was too small to know when I came here; when we first came we boarded, I think about a month; I remember when we came to board at Mrs. Morgan's hotel; I recollect that well; I have a brother younger than I and a sister younger; they were both living when I came here; I don't recollect the year

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that I came. (Was it not in 1853?) No, sir! I think my brother was born that year; I was not old enough to know when he was born; my sister was younger than he; she was born in Washington, Wilkes county; I think we boarded with Mrs. Morgan about a month; I am not certain; we then moved to our own house until we moved to the Wadsworth house; I never went to school till I went at Decatur; the first school I went to was either Miss Missouri Stokes, or Miss Hannah Davis; I went to both those ladies; I can't tell how old I was; I don't know the first male teacher I went to; I went to several; I went to my cousin, Mr. Adams; I went to Dr. Holmes, and Mr. Mann assisted him; I did not go to Mr. Cleaveland; I did not go to Mr. Cochran; I don't know what I studied when I went to Mr. Adams; I commenced studying Latin with Mr. Wood in 1867; Mr. Wilson assisted him—he was a missionary; I believe Miss Beck also taught in school that year; I reckon I was considered a young lady then; I did not study Latin till 1868; I have studied philosophy with Mr. Hunter; he taught during the war, I believe; I commenced to study Latin just before Mr. Hunter broke up; there was an interval; it was after Mr. Hunter came back from the war that I studied philosophy; I believe I went to school to him; I studied philosophy, but not Latin nor algebra under Mr. Hunter; I acted in some dialogues during Mr. Hunter's time; I commenced studying classics under Mr. Wood; I studied French—I studied nearly all the higher branches; I joined the church in March, when Mr. Burkhead was pastor; I had attended church from childhood regularly; I was a young lady, I suppose, when I joined the church; I had been raised in Sunday-school all the time; Mr. Kirkpatrick taught me; Mr. S., Miss W., Mr. Moore and you, Mr. Candler, taught me; Mr. Willard was superintendent; these are christian people; they are intelligent; I was instructed by them; I generally knew my lessons; mother made me learn lessons in the Bible; I repeated chapters from the Bible from memory; I was well instructed in morality, as to what was right and wrong; I was not brought up to

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allow privileges to men; I knew all that before I saw Mr. Wood; I knew the rules and proprieties of society; I knew that young ladies should not allow privileges to young men; I knew the Bible prohibited it; I did not know it was against the law; I knew nothing about the law; I did not know that intercourse with men was forbidden by the laws of the land; I knew it was wrong; I knew all the commandments; I knew them by memory; I knew the commandment, "thou shalt not commit adultery;" I knew it my way, but not the way it has been explained to me since; I thought that committing adultery related to married persons. (Did you not know that that forbid fornication?) No, sir, I don't think I did; I thought adultery was criminal intercourse of married persons, and I asked Mr. Wood about that; I don't know where I learned it; I thought adultery did not apply to a single person; I can't remember where I learned that; I did not think it was right for unmarried persons to have intercourse; I knew it was all wrong before I saw Mr. Wood; in 1865 we lived over in our house; I think the large house near the railroad; in 1866 we lived on the same place in a little out-house, back part of the lot; we rented the dwelling to Mr. Moore; he went there in fall of 1865; we remained there during 1866, and 1867; Mr. Echols lived in the large house; in the fall of 1867 we moved to the Wadsworth house; I think Mr. Wood moved to your (Mr. Candler's) house; Mr. Moore had two daughters; we went to the Wadsworth place when we moved; then Mr. Moore moved there to our house; I think we went to the Wadsworth house in October or November, I am not certain which; I don't know when Mr. Echols went away; I believe he went to your (Mr. Candler's) place; the house we lived in had two rooms, a stack chimney in the middle; it was very near to Mr. Winn's; Miss Stokes and Miss Gay lived near; Mr. Wood lived on a line with our house, but on another street. (Was there any partition in the house?) There was a closet on one side, and a door on the other; door on the right going in, on the north side; there is a north door and a south door, going out of the house; I don't

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know if there was a lock or a button on the door; I think there was no lock on the door; Mr. Wood and I were in the room next this way, (east,) the room next Mr. Wood's; I paid no attention to have it fastened; mother was in the other room; brother was in there, sister was in there; I don't know the time of night, it was about nine o'clock, I think. (When did you say the arrangement was made?) I testified that he told me he was going to Atlanta, and when he came back he would come there, he wrote that in a letter; I burnt the letter; he told me always to burn his letters; he said he would burn mine and for me to burn his; he said it would not be right if the people found it out—it would not look right; I burnt them because he told me; I knew it was wrong to keep them; I knew all about letters; I wrote compositions; I took first prize here in school for composition; Mr. Wood told me the day before that he would meet me that night; he wrote it to me; he had different ways to send letters; he never sent but one by mail, that was when he went to General Assembly; that letter came through this office, directed to my mother; mother received the letter; she did not see the contents; she opened the envelope, and inside was an envelope directed to me; she asked what it meant; I told her it was a letter from Mr. Wood; General Assembly was in Kentucky, Louisville, I think; a letter came addressed to my mother; I won't say the Assembly was in session; that was what Mr. Wood had gone up there for; I suppose the letter came from Louisville, Kentucky; I don't remember exactly; I know it came from him; that was in 1870; I believe in April; all the other letters, not sent by mail, he would deliver to me in school; he had the letter in his hand, he put that in the book; held paper in his hand till I got through the lesson; put the letter in and handed the book back to me; there were other young ladies there; sat on the same seat; they had no opportunity to see the letters; he did not hand the letters in the book in the class; I carried my book out home, and no other girls saw the letters; that is the only mode of delivering letters to me, except the one I received by mail; mother knew Mr. Wood came to the house

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that night; I don't know if brother knew; my mother is a well educated and intelligent woman; has been about a great deal; Wood said he wanted to lie down on the bed; he spoke of giving me lessons; she went out; I was going to school then; Mr. Wood had gone in the evening after school; I don't know how he got back; at nine o'clock he walked back; he told me he walked back; he first went to show me my lessons; he was translating Latin; we were reading Latin grammar, translating English into Latin and Latin into English; then he lay on the bed and asked me to rub his head; he commenced talking to me; he first told me to put my hands on his head; he put his hands on me; never had hugged me before except in the lane; I never said anything to my mother; he kissed me, felt of my person; I never got off the bed; I did not think it was wrong for Mr. Wood, because he told me it was not wrong; he had such an influence over me, I thought what he said was right; I did not feel that it was exactly right; I told him that it was not right, that mother had told me not to allow privileges to gentlemen; I don't know whether there was a light in the room or not; of course there was a light before; I had a light translating; I suppose the light was burning; I know there was a lamp burning and a shade over it; I don't think it was put out; nothing said about putting it out that I know of; I don't know how old my brother was; he is not now in his twenty-first year; he is not as old as I am; he is not passed twenty; I think he is in his nineteenth year; he will be nineteen in June, I think; my sister is sixteen, I think; I don't think we had a clock at that time; we once had a time-piece. (Did you change position on the bed?) No, sir; I did not undress; I laid down on the bed; I did not lie down myself, he pulled me down by him; I was lying down when the intercourse took place. (Did you make any fuss?) He told me not to make any noise; I don't think I did call for mother, nor make any noise for her to hear me; I never had intercourse with any other man till that time; I had gentlemen to put their arms around me, but not to hug me; I mean nothing more serious than having arms around me; he is the

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only one ever felt of my person in a lascivious way; I swear that positively; the first that ever felt of my person, I solemnly swear it; no other person ever felt of my limbs, I solemnly swear it. (Has any one taken hold of your legs?) I solemnly, positively swear it that no other ever had; a male person never kissed me privately; I say to this jury, nobody ever did; I do not solemnly swear that no young man ever kissed me out of presence of others; I never took the hand of a young man and put it in my bosom; I never did; I never exposed any portion of my person to any young man—not my legs; I never agreed to meet any young man for any improper purpose; I never engaged to meet any young man at improper hours either. (Did you do any of these things at the academy?) No, sir; I think no young man ever kissed me privately; young men have kissed me publicly like they would kiss any other girl; no young man ever felt of my person. (Did you never exhibit your person exposed?) No, sir; I never did that in my life, sir; first improper suggestion Mr. Wood made to me was after being at Mrs. Morgan's; I think Mr. Ballinger boarded there then; that night Ballinger went to the academy where Mr. Wood was, and in Mr. Ballinger's presence Mr. Wood said he would not trouble Mr. Ballinger to go with me; the nearest way home was along the public street; the way we went it was round; up to that time Wood had never made improper suggestions to me; I did not object to going with him; I knew it was not the nearest way home, and we walked that back way; I don't suppose I ever saw a young lady and gentleman go that way late at night; we did not come the public way; we went in the lane; we stopped in the lane; he said he wanted to have access to my person. (Did you not say in direct examination that you had no sense to know what he meant?) I did not exactly know what he meant by it; I thought I understood, but did not think he meant anything wrong; I did not want to think he wanted anything improper; I thought that was improper. (Did you not swear before that you did not think that was wrong?) That it was

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a sin? (Did you not know that feeling your person, as you say occurred in the lane, was in violation of the Bible, and wrong, and that you knew it was wrong?) I thought it was wrong, and then I thought Mr. Wood ought to know better; I thought he knew more than I; perhaps it was I that was mistaken, and did not know what was right or wrong. (Did you not swear on last examination "that I knew it was wrong?") I swear now I thought it was wrong; I swear now I thought it was so. (On former trial did you not swear that you knew you would be ruined if you did that thing?) Yes, I did; of course I think it is wrong now—morally wrong. (Was not the reason why you moved from the home place to keep Mr. Moore here?) Yes, sir; Mr. Wood had nothing to do with bringing us over to the Wadsworth house; I don't think we lived there quite a year; the object of my mother's going to Mr. Wood's was so that Mrs. Wood might go to teach school; mother took her place in the family as domestic. (When was the time of the first intercourse?) I do not recollect the month; I think it was after the celebration at the Sunday-school; I never said a single day or month that I could remember; I could not tell the day or the month; I think it was after the annual celebration—that was in June; while we were in Mr. Wood's house, my mother, myself and sister staid in the same room, up stairs; the house is a story and a half; Mr. Wood's study is up stairs; Mr. Wood sometimes staid there late; he occupied that as a study; the room we occupied was a larger room; there is a little pass-way between the rooms; Mrs. Wood's room is right under this; part of the stairway is over Mrs. Wood's room. (Would a person walking up stairs be heard in Mrs. Wood's room?) Yes, sir. (Could they hear talking?) No, sir; they did not hear it; they can hear talking, if loud; Mr. Wood had three daughters; oldest is twelve or thirteen—smart, intelligent children; they staid in the house; Mr. Wood's mother lived there; she is an intelligent lady; she occupied a room on the lower floor; we all occupied this house; the intercourse with Wood went on while they occupied this house; went on all the time I was

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there; I was there nearly a year and a half; the intercourse went on frequently—when a chance presented itself; sometimes in the day time; we left in the fall of 1869; I think we moved back to our own place in 1869. (What about that ring?) Mr. Wood gave it to me after the first intercourse; when we lived at the Wadsworth place; it was a plain gold ring; I kept it till just before I came from Wood's house; I wore it regularly; young ladies saw it; a young gentleman asked me where I got it; young Benjamin George asked me in Mr. Ramspeck's store; I was trading; he said, you have a pretty ring, who gave it to you? I said it was a present; he said was it a gentleman? I said yes; he said, was it a young gentleman? I said, why do you ask so many questions? I said it was a friend; I wore the ring all the time; mother did not know where I got the ring; I gave the ring back to Mr. Wood just before I came away from his house; we had had a falling out; (Did you not love him any longer?) I did not say that; he did not want me to come away from his house. (Did you control the moving?) He said that my coming away proved that I did not want to have anything more to do with him, and he believed that if I used my influence with mother, she would stay; we made friends again; he said he had destroyed the ring; he was so mad at the time, he threw it in the well; he could not be happy, he wanted to make up again; the well was cleaned out; I went to look for the ring; some negro men cleaned out the well; I searched in the sand for the ring; some of the children said, "what are you looking for?" Mamie, Mr. Wood's daughter, said, "is it that nice ring?" I said yes. (Did you not feel that you had done wrong then?) I felt all along I was not doing right. (But you did not quit?) No; I can't say why I did not quit; I was so much under his influence, I just did not do it; Mr. Wood wanted us to remain; I don't know if any one else knew that; I don't know if that was said in presence of others, that he wanted us to stay; mother was anxious to go home; Mrs. Buchanan wanted her to stay; my mother remained here while the Federal forces were here; I don't know how long mother had known Mrs. Buchanan;

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I was here while the armies were in here. (Did men stay at your mother's house during the latter part of the war?) I don't understand exactly. (Did men not board there?) I only remember but one man, Mr. Warren; mother took care of him, he could not talk. (When the war broke he began talking?) Yes. (Question objected to by State; Colonel Candler said: "We wish to show that witness was acquainted with familiarities and intimacy between men and women." Judge: "The testimony is objectionable.") In the fall of 1869, we occupied the old home; my child was born February 3d, 1871; the intercourse with Mr. Wood was in 1868, after we moved over to the home place; I went to Mr. Wood's house, and had intercourse with him; sometimes mother would go with me to church, and I would go to Mr. Wood's house after prayer-meeting; mother would go to Mrs. Buchanan's in the same house; I would stay at the prayer-meeting and mother would go on to Mr. Wood's house, then after prayer-meeting, I would go to Mr. Wood's; go in the house; Mrs. Wood would be at prayer-meeting then; she would be in church when I went to Wood's house; she would come along behind; I came by myself; I would go into the lot; I staid outside in the lot till Mr. Wood came; Mrs. Wood went to her room sometimes; sometimes to Mrs. Buchanan's room, that was below; Mrs. Wood would be in the adjoining room, and I had intercourse with Mr. Wood; I staid in the yard till Mrs. Wood went in, then I went in and had intercourse with Mr. Wood; we had intercourse more than once in a night. (How often—a good many times?) What difference does that make? (We want the facts as they are?) Once or twice—sometimes as many as twice; then I would go home myself; it was nearly half a mile home; mother had gone home; I would just go in; mother once or twice asked me when I came in, "who came home with me;" one time in particular, I told her that Mr. Wood walked home with me; he met me at Mrs. Morgan's one time; I went to visit at Mrs. Morgan's after this intercourse. (How often did you go to Mr. Wood's house?) Not so very often after I went home. (Did you ever go in the

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day time?) I have been in his house in day time, but never had intercourse with him in day time, after we moved home; it was always at night; he would fix the time for me to go; (beforehand?) whenever he would see me, it would be that day. (Had you not time to think before meeting him?) Yes, sir; we had intercourse at the old place once or twice; I remember more than once—twice, I believe; once was in room down stairs, and once up stairs; the room down stairs is the sitting room; in the day time Mr. Wood came, and we had intercourse; there are three doors in that room; the house is close to the depot; at that time he was regular preacher and pastor of the church; he came there, and we had intercourse; I think mother was gone out; Colonel Lowe's family had not come to the house at that time; I don't know when Colonel Lowe's family moved to my mother's house; he had an early garden there in 1870; my child was born in 1871; I had no intercourse with Mr. Wood while Colonel Lowe lived at our house; in our house the last time was when he, Wood, came from the General Assembly; that was last time we had intercourse; not long before he went to General Assembly we had intercourse; I think it was just before I went to a Good Templar's fishing party; I think it (intercourse) was just before that, at his house; on the night of the fishing party I went to his house and had intercourse, and I think that was the last time I went from my home; I went home from the fishing party, then I went to Mr. Wood's and had intercourse with him; I think that is the last time; then the 3d of February I had a child. (Do you recollect when Mr. Kirkpatrick, myself and Mr. Barry, were at your mother's house, after the birth of your child?) I recollect that occasion well. (Did you not tell me at that time, about three weeks after the birth of your child, at night, in presence of Mr. Robert L. Barry and James W. Kirkpatrick, your mother, and your brother, and Mr. Wood, the defendant, that you never had intercourse with him but one time in your mother's house, and that is the time you have spoken of in the sitting room?) If you ever asked me that question, I did not understand you

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to mean that; I think you asked me, "did you ever have intercourse in the house, there;" I told you I remembered once; I don't think I did say never at any other time, but that time; if you asked me that question I did not understand it; though you might have asked it that way, but I did not so understand it. (Did not I present the difficulties of such a thing, and say there might be more convenient places, and call your attention to all these things carefully?) I don't think so, Mr. Candler; I don't remember your presenting the inconveniences of these things. (Have you not sworn that you yielded to Mr. Wood for these things that Mr. Wood told you?) Yes, sir. (That he loved you better than any other woman alive, etc.?) Yes, sir; I swear that now. (On that same night when we visited you, did not I ask you, Miss Emma, did you not know that Mr. Wood was married and had a wife and children, what did you promise yourself in having this intercourse, did you not say, "because you loved him?") If you did put the question to me in that way, I did not understand you to do so; if you said that I did not understand it; I think you said: "Now, Emma, it is mighty strange, here is Mr. Wood, a married man, your pastor and all this, did you love him, what did you promise yourself, did you love him?" I said; Yes, sir, I love him; I answered that question; you went on as quick as you could and asked other questions; I think I told you, that he had told me, he had made it a subject of prayer; I put in an explanation, you did not give me time; you said: "Answer my questions as I ask you; I don't want explanations;" you said: "Just answer my questions as I ask them;" I think that is the way you put it that night; I think I told you that Mr. Wood had told me that he had made it a subject of prayer; you were the first that I told about all the circumstances. (That night did you say anything about Mr. Wood promising to marry you when his wife should die?) I think I did; I am not certain; I don't remember whether I did or not; I answered every question you asked me. (Was such a question asked you?) I don't know, sir; I don't know if I told you that Mr. Wood said his wife was

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in bad health, and could not live long. (Did you tell us, that he said that he loved you better than any other woman living?) I think I told that. (Did you tell us that he said, that you and he were congenial?) I believe there was something said about that, but I am not certain. (Did you tell us, that he said he would marry you as soon as his wife should die?) I do not know; I don't remember what I said that night; I think I told you that Mr. Wood said it was not wrong to do anything of that sort; I was well acquainted with Captain Barry, Mr. Kirkpatrick and Colonel Candler; I knew what you were sent to see me for; I knew before that you were coming; I said I would tell all the facts about it; I knew the object for which you came; I was up and dressed; I was reclining on the bed; I think I told you about the lane scene; I think I told you about that. (Was anything said that night about seduction?) All was said about the child. (When was the first time you learned about the law, was it when you went to the Ordinary?) (Question objected to by the State. Judge: "What is the object of the testimony?" Mr. Candler: "She has learned about seduction afterwards. I wish to get a paper in Court from the Ordinary's office. We believe seduction was an afterthought." Judge: "Whatever word she may have said or written may or may not be of importance, but the examination is taking a wide range. What question do you want to ask?" Mr. Candler: "I want to ask if she did not take a paper to the Ordinary and sign it?" Judge: "Ask the question.") (Did you not, after the birth of your child, go before the Ordinary and take an affidavit?) Yes, sir; I wrote a copy myself; I had a regular certificate of the Ordinary to sign; I did not fix up that paper; a lawyer fixed it up for me; then I copied it myself, and swore to that before the Ordinary; I copied it myself; I copied it at my house; I copied it because I thought I had to swear who the father of my child was; I went to swear Mr. Wood had ruined me and was father of my child. (Were you in the habit of going into the woods with young men in the night or day time?) I have been out in the day time; I have been

late in the evening, but not in the night. (All day and afternoon?) No, sir. (Have you never been out blackberry hunting with young men and brought no blackberries back?) No, sir. (Have you not been out and allowed young men to kiss you and hug you?) No, never. (Paper shown to witness and identified as the one she swore to and signed before the Ordinary.)

Redirect examination: (At the time Colonel Candler alluded to, when he visited you at your house, what was your condition as to health?) I was sick; I was just recovering from illness, after the birth of my child. (How long had you been sick?) I had been sick a month before the baby was born; I was out of my head a month; I did not remember anything that happened the month preceding the birth of my child; Mr. Candler was there about three weeks after the birth of the child; I was weak and sick—not able to sit up much; I had not been outside the room, I think; these gentlemen were elders or deacons and Sunday-school teachers; I never said this child was anybody's else but Mr. Wood's. (When was the fishing party you spoke of?) I believe it was in May, I am not certain; I think that was after Mr. Wood went to the General Assembly; to Mr. Wood's house there was a half story, the intercourse took place both above and below, in his study; Mrs. Wood's room was under his study; this house is not far from the church; there are no houses between, I think; there was a little house in the woods just out, not far off; I went to his house after we moved from there; he would follow me and tell me in the day time when he wanted me to come; to stand out and wait for him and he would go in and get a light and fasten the door between his room and Mrs. Wood's room; that was a room down stairs; intercourse took place then in the room below; he would lock and button the door; I would go in that room; I was not going to school to Mr. Wood at that time. (How about hearing below from the room above?) They might hear if any one was talking loud; they could not hear ordinary conversation; they might hear a noise, but could not distinguish what was

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said. (What is your understanding of hugging?) Any one that had arms around me and pressed me to them, held me in close embrace; they have put their arms around me in play—blindman's buff or something of that sort; they might get us in a corner and catch us; sometimes they might kiss us in that way; they played with the other girls in the same way; no one ever hugged or kissed me except in that way; I know Thomas Kirkpatrick; I have seen the affidavit he made.

Recross-examined: (Were you in your proper mind when we visited you?) Yes, sir; I had headache; I made no complaint; I don't think I had been outside the room; I am almost certain I had not been in the yard; I had been sick before the birth of my child; I had spells before of congestion of the brain; in the month of January I was out of my head; I thought I was pregnant, till the doctor came; he said different causes might produce my sickness; I was afraid I was pregnant; I did not know it; I don't know if the room in Mr. Wood's house is ceiled overhead; I think there is no ceiling; when Colonel Candler and others visited me, I told them that at first when I began to be sick, different causes made me think something might be the matter; I told Mr. Wood I was afraid I was pregnant; he said he did not think so; he would ask Doctor Durham; after that I did not suspect anything of the kind; that was what I told them; that was when I was first taken sick. (Emma, what did you tell us about that when we visited you, and asked you did you not say you expected something was wrong, and you intended to ask Dr. Durham about it?) I told you all that at first; when I stopped menstruation, I suspected something was the matter, and I asked Mr. Wood about it; he said, "no, I don't think so;" he said, "maybe it is a cold," and turned it off that way; after I was taken sick with congestion of the brain he came to see me; I told him; he said he would ask Dr. Durham what was the matter with me; he did ask Dr. Durham, as he said; I think I told that circumstance to these gentlemen. (On your oath, Miss Emma, you now say to this jury,

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that you told me, in presence of Mr. Barry, Kirkpatrick and Mr. Wood, these things?) I believe I did, but I will not swear to it; I state that as my belief, that I told it that night.

HARRIET H. CHIVERS, sworn: I am mother of Emma I. Chivers; I live just beyond the depot, in this town and county; I know the defendant; I have known him a number of years—several years, probably seven or eight; I don't remember the exact time he has lived here; he has lived here since the conclusion of the war; he became pastor of our church; I belonged to that church—my daughter, also; defendant was a teacher at a school in this town; the war, at its termination, left me penniless; Emma had no property; the land we live on belongs to my son; Emma had been going to school to Mr. Hunter during the war; I sent Emma to school, and Mr. Wood did not charge anything; I can't remember years; I don't remember dates, nor when it was that Mr. Wood commenced teaching school; I sent both my children there; he charged nothing for their tuition; they continued going to him; he said nothing to me about Emma at that particular time; I moved to the other house in 1866; Emma had been attending defendant's school then, and he charged her nothing then for tuition; I suppose it was in 1866; after I moved over here (to the Wadsworth house) Wood wished me to move to his house; before that he wished to take charge of her tuition, and to direct her, and to have her under control, and wished me to keep her from all young men's company; said that she had too much young men's company; he wanted her to be kept so she could attend fully to her studies; I gave him full charge of her; I went to his house to live as a friend, because Mr. Wood took charge of the school; the school was so large he wanted an assistant, and he wished Mrs. Wood to go to assist him; he wished me, as a friend of the family, to take charge of family matters; I could not do it without carrying my family with me; my son is gone to Montgomery; I was to pay him, Wood, a certain amount for Emma's board, \$4 00; my little daughter was to take care of his mother; Mr. Wood

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requested to have charge of her tuition, and charge nothing for it; I paid him till Mr. Buchanan died; that was in about May or April, 1869; I don't remember the date of the year, but it is well known when Mr. Buchanan died; I had done some waiting on him; I had done what I thought was my duty; Mr. Wood would not take pay for Emma's board; after that Mrs. Wood was taken sick, then Mr. Wood and Mr. Ware joined in the school; during the war I staid at my own house, when the enemy came in; I had no money to get away; it was poverty kept me here; poverty compelled me to stay; I was present at the birth of the child. (Did you ever hear that Mr. Wood was father of the child, in Mr. Wood's presence?) I did, one time; that was when Colonel Candler, Mr. Kirkpatrick and Mr. Barry were present; Mr. Wood was present then; she stated then that Wood was father of her child; I lived in Mr. Wood's house as one of the family, not as a servant; before I went there, he was a constant visitor at my house; we were old friends; his father and mother seemed to think much of me; I looked on Mr. Wood as the son of a dear friend; I trusted him—had all confidence in him; I supposed Mr. Wood came to visit my house for the same reason of friendship; I had confidence in him as a Christian and a gentleman, and many now have the same confidence in him; I was alone, and liked to have friends to call upon me, and wished protection to my daughter, as every one said she was my idol; I looked on her to assist me when I was old; the opportunity to be a teacher was a great thing; all these things made me have that confidence in him; he came to my house as any other gentleman came; I never knew anything from him but as a gentleman; he came to assist Emma in her lessons; he was not a tutor in my house, but came to assist her in her lessons.

Cross-examined: (When was Emma born?) I can't tell you, sir; strange as it may appear, I never can remember dates; I cannot on my oath tell you when she was born; she was born in New York city; I know the circumstances; Dr. Chivers was there at that time; I had two younger

children when I came to Decatur—a son and daughter; Emma is nearly three years older than Tom—two years, and from November to June; Emma was born in November; Tom was born in June. (What is the difference between Tom and Bell?) The same difference; one was born in June, the other born in February; nearly five years between Emma and my youngest daughter. (When did you come to Decatur?) I don't know the year. (Can't you fix the year?) The first house I occupied was the one where Mr. Ladd now lives; Mr. Morgan is dead; his widow is living a mile or two from town; we lived with Mrs. Morgan, probably a month or six weeks, till we got into our own house; we boarded with her till we obtained possession of our own house; next November is Emma's birth day; I reckon she will be twenty-one or twenty-two years old; she will be twenty-one, I think, sir. (Did you not swear last trial that she was past twenty-one?) I think not; I can't remember anything I swore then; yes, sir, she is twenty-one; she is not twenty-two. (Has not the matter of her age been talked over several years, did you not keep a record in a book?) I don't know; I never endeavored to keep account of her age; John Hardman wrote the Bible record; I know about the time my children were born; after Mr. Adams came, he told me the year in which Emma was born; that differed from the record I had in the Bible; I judged of their births; I then got John Hardman to write in the Bible record; I had made one and then corrected it; that was the occasion of its being altered in my Bible; I had no idea of this kind of a thing, or I would have been more particular; I am one of those sort of people that don't take a great deal of method in their actions; I am sorry it is so; the record in the Bible is in my house, I don't look at it; I know she is my child, and where she was born; I have paid no attention to it; my Bible is there and it can be brought; I am not swearing from the record; John Hardman wrote the first in it; he amended that same one at Mr. Adam's suggestion; I did not recollect at first when my children were born; when I came here, my youngest daughter

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was not a year old; I had been here two years when Dr. Chivers died. (You stated that during the latter part of the war you did not leave on account of poverty?) I staid here because I had no way to get away; it was poverty; I had no money to get away with. (Did you not send six or seven negro slaves to Macon?) Yes, sir; were they available to me? I had somewhere about twenty slaves then; I had several thousand dollars due me in Confederate money. (Was there any difficulty then in getting money?) It was in scrip, in Confederate bonds; I could get interest, but not money; I did not have Confederate money; I loaned money to Mr. Warren Davis; I don't remember if I loaned any to John McCay; I had loaned money to Dr. Hoyle; I could not get it then; there was difficulty then; I went to him for it, and could not get it; he was a man of wealth, but he did not get the money. (At the end of the war this home was all you had and some notes?) Yes, that is all; there are about sixty acres of land; I rented that out for some \$400 00; Mr. Wood had no money that I knew of except his salary; he sent Tommy, as well as my daughter to school; he did the same way to my son and daughter, in giving them tuition without charge; it was my favorite idea to make Emma a teacher, that was my idea before Mr. Wood came; Mr. Wood did not suggest that to me; she had been to Mr. Hunter; he did me the same kindness, and did not charge for her tuition; I knew old Mr. Buchanan before I knew Wood; during the war I did them many kindnesses; all in town knew that; in October, 1867, we moved to the Wadsworth place; all three families moved at the same time; I waited for some repairs a day or two; Mr. Kirkpatrick moved me over to that place, he made no charges; we went to Mr. Wood's house in the summer; I think it was in July—possibly it might be August, 1868; at that time, Mr. Buchanan was living; he lived in that house till next spring; he was step-father of defendant; he seldom ever went away; he was a fine, intelligent and good old man; he remained there, night and day, on the lot; my daughter had a child on 2d February, 1871; I never saw anything by which I

could suppose or have knowledge of any impropriety—no actual knowledge of anything improper between Wood and Emma. (Did you not swear, on the last trial, that you had no sort of suspicion; that you thought Emma a little lower than the angels?) I said I never had the suspicion that Mr. Wood was anything but a good man; up to the birth of Emma's child, I had no knowledge of anything wrong; in 1866 and 1867, Emma was only a child, not a grown woman. (During the time you lived at the Wadsworth house, was your daughter grown?) She was not a matured woman at first; she had a great deal of company; she went into society, but was actually a child; she had a good deal of young men's company; a good many young men visited my house. (Were they there during your absence?) Sometimes, when I was away, they were; I have been told so. (Were you absent frequently late at night?) Not late, sir. (Were you not frequently away all night?) Yes, sir; I left my daughter there; I have been to several houses in this town where there was sickness—never for pleasure. (Were you not away so much at night that your attention was called to it by your friends?) One time that was done when Miss Brown was sick; she desired my company; my children, I supposed, would take care of themselves; I stayed with her night after night; Mrs. Eddleman was with her alternately. (Was not your attention called to a certain young man being there too much?) My attention was called to it by some of my friends; that was told to me afterwards; I had told him not to go there during my absence; I was not told at the time these things were going on; it was told to me afterwards—after the thing was talked about; reports were circulated; they did not tell me at the time, but afterwards they came and told me; I had already seen the young man and told him I did not want him to go there when I was gone, but he had been there before I told him. (Do you know if he was there at improper hours?) Not of my own knowledge; I was not there; I was with the sick; that was in a house in back part of the lot, just inside the breast-works; Mr. Echols lived in the principal house; it

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was not more than fifty yards from the principal house, included in same fence; Mr. Moore had two daughters; Mr. Candler came to me and said that the house was in bad repair; that Mr. Moore did not want another family on the lot; he wished the house for his own use—the one I lived in; Mr. Moore was a good citizen; we wanted to retain him in town; I left there against the wish of my husband; Mr. Candler and Mr. Kirkpatrick made the bargain for me to move over here to the Wadsworth house; Mr. Moore always paid me in advance; Mr. Wood had nothing to do with it, only he thought it a good idea; he never consulted me in regard to it; Mr. Candler and Mr. Kirkpatrick did all the bargaining; they caused me to leave. (What was said in reply when Emma said that Mr. Wood was father of her child?) Mr. Wood said it was a false, infamous lie; she did not say afterwards that it was not so. (Did she not say, in presence of Mr. Kirkpatrick, that it was not true?) Mr. Kirkpatrick talked with her and said she was insane. (Did she not say that she hoped it was untrue?) I never heard that; I am a woman that does not tell anything but the truth; she did not say that.

Redirect examination: (Something you said about a young man?) That was Charles Ramspeck; he lives in this town. (When do you speak of?) I don't remember the circumstances; it was when I was taking care of Miss Cynthia Brown; Mr. Ramspeck visited my house frequently. (Why?) I knew he came with same design other young men came visiting; there was no relationship, except as friends; never any engagement between them; I presume he was courting; we scarcely know now when a young man is courting a girl in these days; he came there frequently; whether he addressed her to marry, I do not know; there were some young men that did address her; Mr. Ramspeck has never denied that he admired her; I am unable to answer whether he loved her or not. (What is your recollection of dates?) I cannot recollect dates.

CHARLES M. RAMSPECK, sworn : I do business in Atlanta ; I spend my Sabbaths in Decatur ; in 1866, and portion of 1867, I resided in Decatur ; I was acquainted with Emma I. Chivers ; I visited her very frequently. (What were your feelings towards her ? Question objected to. Judge : "Confine yourself to facts, not as to his feelings ; show what took place.") I went there frequently. (What was her conduct as to propriety ? Question objected to. Objection overruled.) I am the only Charles Ramspeck living here then. (What took place between you and her ?) Nothing improper ; I visited as other young men did ; I was partial to her, thinking I was her favorite ; I was going along very well, till some parties tried to slander her ; I thought it uncalled for and false, as far as I could see. (Was there anything improper ?) Nothing ; she was the most prudent young lady I ever saw. (Did she allow any improper intimacy ?) No, sir, not on my part, or others. (Did you ever attempt to kiss her ?) I believe I did, and was repulsed ; that was in 1867 or 1868 ; I was here on Saturday evening and Sunday ; I never spent but one Sabbath in Atlanta in December, 1865—latter part of the month ; other young men visited her ; I met them frequently. (Was there anything improper then ?) Nothing, that I ever saw. (How did she conduct herself ?) Very lady-like ; I have frequently seen boys play with handkerchiefs, but nothing improper, that was in public ; I suppose, in 1866, she was sixteen ; she was a young girl. (Did you believe her to be a virtuous woman ? Objected to ; objection sustained. From your association with her, state if she was a virtuous woman ? Objected to ; objection sustained. Did you ever know anything in her conduct tending to show she was not a virtuous woman ?) Certainly not ; I don't wish you to infer that I never knew of reports injurious to her character, but merely that the young lady was acting imprudently in allowing me to take her around to church so frequently as she did ; I heard from a lady that that was the report.

Cross-examined : I came to Decatur in December, 1865—29th or 30th of December ; during 1865 I was in Charleston ;

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I had an establishment of my own in 1867, a few months; I used to do business; I am not certain as to the date, probably May, June or July, 1867; then I went to Atlanta, and came back on Saturday, sometimes on Friday; once in a while I might come during the week; my first visit to Miss Emma was in 1866; I think in October; it might be a little before or after. (Had she received attentions before that?) I don't know anything about that; she was generally escorted out by young boys from school. (Did young men pay attentions to her before 1866?) I don't know; my first visits commenced in 1866; my attentions begun in 1867; early in January, 1867, my attentions were more frequent; Mrs. Chivers and Miss Emma were living then I can't answer where; I can't tell if in the large house; my first visit was in the main house; I afterwards went alone, and sometimes with other young men; early in 1867 they were at the house near the breast-works; I went there both day and night; I staid late; I have been there frequently after eleven o'clock; I went early and remained till eleven o'clock; not as late as I went and stayed at other places at respectable houses; I think I have seen others there; I recollect going there once when Mrs. Chivers was not home; I have gone there and found her absent and remained. (Have you not frequently been in the room without light?) No, never; not to my knowledge; there might have been the absence of a lamp or candle, but a light in the fire-place always; some light as good as lamps or candles furnished. (Have you not been seen lying on the lounge with no light in the house, with her head in your lap?) No, never; nobody ever saw that. (Let us reverse it: have you not been seen there lying down with your head in her lap?) No, never. (Were you not there once and sent Adams home and her brother out, and they came back and found you in that position?) I don't recollect ever sending them off; I think I did not; I have seen Mr. Eddy Adams there; he was not a young man; I understood he was partial to the young lady prior to my acquaintance with her; he was intimate with me also in 1867; he is intimate with me now; there

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is as much friendship now as ever was. (Did you ever go through the woods late in the afternoon by yourselves?) Of course I have gone along in the woods, by the branch; we went gathering flowers and picking blackberries. (Did you bring any back?) I think so; I am not positive, though; I think we brought some blackberries back.) (Did you say you never kissed Emma I. Chivers?) I never said anything of the sort; I said I might have kissed her, but not to my certain knowledge; if I did, it was something she did not permit; I never kissed her privately. (Did you ever on the railroad, late in the evening, on any occasion kiss her?) No, sir, not to my certain knowledge; I will not positively swear I have not done so; if I did, it was a stolen kiss. (Did she propose to recover it?) I don't think it was ever recovered; I did not attempt it again. (Did you not kiss her on the railroad one evening?) I don't know that I did such a thing, though it might have occurred; I visited her frequently during 1867, and after she went to the place by Mr. Winn's. (Did you ever go there from Sabbath-school and remain till dinner?) Yes; Mrs. Chivers might go off and leave us; I have gone back over there after dinner, but not frequently. (Would Mrs. Chivers leave you?) Not to my knowledge, though she might have gone out. (Were you not frequently there of nights?) Certainly; I was partial to the young lady; she could attract me further than any one else; I enjoyed her society more than any one else; I have no knowledge of ever staying after twelve o'clock at night; I have noticed the time; I think they had a clock; I know after awhile she would not let me stay after half-past ten o'clock; I may have stayed there till twelve o'clock; I have no knowledge of staying after twelve o'clock; I don't ever remember of staying without a light; In going and coming I should have to pass their (Stokes & Gay's) house; I made a practice to pass that house; it was the most public way; I thought it prudent to take that direction, in consequence of reports that had been out; reports were then out; I did not wish to do anything that would reflect on the young lady; James Kirk-

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patrick lives near there, in a line with that house, two or three blocks off; Mr. Winn lives about two blocks from that house; I may have seen Mr. Kirkpatrick and J. L. Winn there; Mr. Winn lived with his mother, I presume. (Had you ever your head in her lap?) No, sir. (Did you ever hug her?) No, sir, I was not after hugging, I was after the young lady; I was there frequently in 1868; about that time she became cool to the young men; once I asked her who she loved best, expecting she would say it was me; I never hugged her over there, or kissed her, or had my head in her lap. (Do you recollect the date of the fishing party?) I recollect the fishing party; I don't recollect the date, whether in March, April or May; it might have been in March, April or May; I can't say it was on the 7th of May; I can't say it was a May party; I was at that party; I don't think I went with Emma Chivers that day to escort her to the party; she did not remain at my brother's that I know of; I might have been there about supper time; I don't recollect where she was; I know she was at my brother's house on morning of the fishing party; I don't know that she came to my brother's and remained there a week; she may have been there; I recollect the day I heard the baby was born; I heard it on Friday night, early in February; I heard it in Decatur; brother told Eddy Adams he did not think Charlie had heard the news; I was thunder-struck when I heard it, when they told me who it was; after I got home my brother told me and I was thunder-struck; I don't think I went to see Emma the succeeding Sabbath, or to the house; I went over perhaps two Sabbaths after.

Redirect: Hearing that Tom Chivers had been out to see me, I did not want to turn from him, and turn my back on him because his sister had had a baby; I went to Dr. Durham and asked if he would go over to Mrs. Chivers with me; the old doctor not being home I took the young doctor, and we went over; that was probably the second Sabbath I went over with young Dr. William Durham; he was not a married man; I think I informed you (Colonel Candler) of

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it the next morning; I told you I had taken some one with me; I think I had frequently found you there, too; I don't know whether it was the second or third Sabbath.

Closed for the State.

DEFENSE.

ANDREW D. BARRY, sworn: My name is Andrew D. Barry; I came to Decatur in 1857 when I first came; I returned here in 1865; I came back then; I went to my uncle's, E. A. Davis'; I became acquainted with Emma I. Chivers before the war; I was at school with her before the war; I don't recollect the year; I think it was in 1859—I am not certain; I went to school with her in 1867; I had a session with her in 1867, at my brother-in-law's, Mr. Moore; he was living at the Chivers' place; I saw her there; I saw her frequently; in 1865 and 1866 I think Mr. Moore lived there; I came from Ringgold on a visit; I was going to school at Ringgold; then I saw her; I was here only a short time—probably three weeks, in January, 1866; I met her during that time; we were particular friends at that time—old sweethearts; I came here in December, 1865; she was living in the yard with my brother-in-law, Mr. Moore; she lived in an outhouse; I was there probably every other day. (What did you do?) I hugged and kissed her frequently; felt of her breast and her thighs. (How?) We were sort of scuffling; I caught her; she did not seem to resist it; very little resistance—in fact, none at all; that was in December, 1865, or January, 1866; on more than one occasion we were out in the yard of Mr. Moore's; no one was with us. (When did you feel her breast?) That was the same time; no one was with us; she made no resistance. (Were her breasts developed?) Tolerable full breasts at that time. (Did she make complaint, or cry out?) None at all; did not seem to mind it at all—she took it pleasantly; this was done twice, I think; I went to school here a year after that; I don't exactly remember what year that was; it was while Mr. Wood and Mr. Wilson were teaching; Emma went to school then; that was later than 1867; it was the fall

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of the year when I went—probably 1868 ; it was first year he taught school ; Emma went to school then ; I went to school two or three months—I went regularly ; I saw her every day ; I had no particular intimacy with her during that time ; I don't think I did anything towards her. (Did you see any acts of intimacy between her and Mr. Wood?) None at all ; never saw notes passed. (See any improper conduct?) No, sir, none at all. (Did you see any improper conduct with any other person?) No, sir, I don't think I did ; she was not very particular keeping her legs hid during the session ; occasionally she exposed her legs ; she was then considered a grown young lady.

Cross-examined: (When did you take the last liberties with her?) In January 1866 ; I went to school with her before the war and since, either in 1867 or 1868 ; I was with her occasionally in 1866 ; I visited her very seldom. (Was she not a mere girl in 1865?) If I am not mistaken she was just as large as she is now. (As well developed?) Probably not in some branches ; I don't know what particular branches ; I suppose she was so in person ; I thought you referred to her education, when you asked about being developed. (Do you say now Emma was a young woman in 1865?) Yes, sir, I think Emma was ; I was sixteen years old, not exactly grown ; I considered myself a man. (Were you then a grown man?) I was considered by some people as a boy ; I had some beard then ; I had not let it grow ; I was going to school ; we had not commenced reading Latin or Algebra ; Miss Emma Chivers was ahead, she was further advanced than I was. (Were you sweethearts and old friends in 1866?) I told her I loved her ; I think she loved me ; I had told her about it ; I don't think I told her that before I felt of her ; I did not think about its being any harm ; I don't know that I considered it child's play. (Objected to—objection overruled.) I did not think much about it ; I did not care then. (Did you love a woman who allowed liberties with her?) I just had that love ; I thought I could go so far and no farther. (What kind of love had you for her?) I did not love her as any

other boy would love his sweetheart; I was trying to have intercourse with her, that was my object; that is what I meant by hugging; and I felt of her thighs, that was outside of her dress; I put my hands on and squeezed them; I don't know what I said; I don't know what I did say; that was at her old home; we were out of the house, in the yard; we were on the side where the chimney stands; we were standing up; there was no one there; I suppose it was near one or two o'clock in the day time; they might see it from the depot; I won't be confident of the exact time; I don't know where Mrs. Chivers was; she was in Mr. Moore's when I got in the house; Mr. Moore was then living at the big house; it was near the big house I felt of her; Mr. Moore's family might be in there; I had been in the house; I saw them in the house; I don't think I had seen them leave the house or lot; there were a couple of windows on that side of the house, I think. (Is that the room where Mrs. Moore sits?) Yes; there were blinds, I think, I won't swear it; it strikes me there were blinds; I did not do it very quick, it took some time; I don't know how long, probably a minute or two, maybe not so long; we had been playing and scuffling; I was feeling of her legs then; we had been playing and scuffling, most anything, not trying to throw down exactly; we were sort of running after each other; I had caught her in this place; I felt of her titties and her thighs, and hugged and kissed her a time or two; she said nothing; she seemed to be well pleased, I thought; I don't know where Mrs. Chivers was, she might have been in the house; I had seen her in the lot when I first went there; I was there probably an hour or an hour and a half; she had been in small house; I had been in large house; had not hugged or kissed her there; I don't know that I told her that I loved her there; I saw Mrs. Chivers when she was going to Mrs. Moore's house, she was on the way when I was going from Mrs. Moore's to her house; Emma and I were in the lot by the house; Mrs. Moore's family were in the house; Mr. Moore, his wife, and couple of daughters, between sixteen and fourteen, very nearly as large as Emma; I had been in there with Miss

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Emma; I stayed probably half an hour in Mrs. Chivers' house; we were talking; don't remember what we talked about; don't know why we came out; we went back to Mr. Moore's house; no one was in but Mrs. Moore; don't know where his daughters were; they were not in the room that Mrs. Moore occupied; the room this way where the window looks over the place where I was with Miss Emma; I don't know where we went to when we came out of Mrs. Moore's; no one was with us that I remember; that was the time we commenced running; I think she ran first; I don't know what I was trying to do when she ran; I might be kissing her; I don't know; it was only a short time before I caught her; I put my hand on her breast, not under her clothes; my hand would hold her breast; it was a tolerably good size. (When was next time you got to her?) A short while after that; I don't know where or when; I think it was in Mr. Moore's house; that was at night as well as I remember; it was after dark; after supper; there were several there that night; I think Mr. Kirkpatrick and Robert Brown were there; we were having a little party; Mr. Moore's daughters were there; it was just a candy pulling; we did not all eat supper there; I think supper was before we left home; all Mr. Moore's people are considered nice people; I don't recollect the time I got hold of Emma; it was in the room; Kirkpatrick and Brown had gone out: they had left us in the room; the door was shut; I suppose Mrs. Moore did not want to be annoyed with the noise; I can't repeat the words I said to her; I loved her; I hugged and kissed her a time or two; I caught her and embraced her two or three times; we were in there some five or six minutes; I can't give the dates; in December or January; in Christmas week or before; it must have been eight or nine o'clock when they went out of the room; I don't know what they went out for; it was not very cold that night; we had a fire in there; I did not promenade that night; I felt of her thighs that night; I got at them outside; I sort of squeezed them a little; I think that was the only time I felt of her; I hugged and kissed her before. (Did you go with her after

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that?) I don't remember; I went to school with her after that; I associated with Mrs. Moore's daughters after that, probably two weeks, in 1866; I stayed about two weeks; I never notified Mr. Moore that I had hugged and kissed Miss Chivers; Mr. Moore's daughters were my neices; his wife was my sister; I was only a boy at that time. (If you had believed her a bad woman, would you have notified Mr. Moore at that time?) I would not at that time; my purpose was at that time to have connection with her. (Why did you not go further?) I was most too young at that time; I thought that was far enough; that was the only reason that stopped me; I came back here in 1866; in the summer or fall; Miss Emma I. Chivers was still here; I very seldom visited her; I think, as well as I remember, I visited her once or twice. (Do you swear you went to see her again?) I can't be confident; she did not forbid me to come there; nor tell me to keep away from there, in no shape or form; when I came from Ringgold I did nothing when I went to see her; I did not try to do anything; I did not love her then at all; I don't know that I had seen some other girl; I think, if I am not mistaken, that I went to see her once or twice; I never hugged or kissed her or felt her thighs after January, 1866; I shook hands with her; she shook hands when I went to see her; I never went to try to hug or kiss her. (Was she not pretty?) I never fancied her after that; before this I loved her; I found a change in her; I could see no difference in her appearance since I came back; she was well made. (Were you in the habit of hugging other girls? Question objected to; ruled out.) I went to school with her part of a term; we were not very intimate then; there was a sort of a coldness; I don't know what produced it; I don't think it was produced by my hugging; she never said she was mad; I thought it was because I did not go over with her; I can't swear that she was mad because I did not have connection with her. (Who was the first you ever told about hugging and kissing her?) I don't know who was first or when I told it; I don't know that I did till last year; I don't recollect; seems to me I told one or two friends

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before that ; I think I told Mr. Davis before the birth of that child ; I don't remember the time that I told Moses Davis. (Who else ?) I think probably I told a young man named McCulloch. (After birth of the child ?) I might have told several. (Did you ever tell Mr. Wood ?) I never said a word to him ; I never told his attorney about it till a day or two ago. (Did you not make affidavit last October ?) I told Judge Hillyer about it ; it was last fall some time ; I don't know how long before the affidavit was made ; I went to him ; I thought it was important that I should do it. (Who told you so ?) I don't recollect who ; my friends generally told me to let it be known ; Mr. Davis told me to go to Judge Hillyer ; I never talked to my father about it ; Captain Barry never said anything to me about it ; he never said anything till after I made affidavit ; I never told him.

Redirect: There was no house near Mrs. Chivers' in 1866 ; these new houses were not built ; there were none near the depot ; Mr. Moore's daughters were not grown at that time ; they went off to school soon after ; I don't know how old the oldest daughter was ; not as old as Emma by a year or two ; I think Judge Hillyer had not been in the case before I went to make affidavit ; I don't think Captain Barry lived here in 1866 ; I never mentioned the matter to him till after affidavit was made ; I told it to David McCulloch ; he is in Alabama now.

THOMAS S. KIRKPATRICK, sworn: I was raised right here in Decatur ; I know Emma I. Chivers ; I knew her in 1865, 1867 and 1868 ; I knew when she lived near Mr. Winn's house ; in the fall of 1867 she moved there—moved from there in 1869 ; I think she was there in summer of 1868 ; in 1867 she lived in the kitchen—back of the house—they now live in. (If you had any intimacy with her, what was it ?) One time I went over there in the fall of 1867—I don't recollect exactly—or 1868 ; I was over there one night when Mrs. Chivers had been doing some sewing ; she asked me to wind up the clock ; that was in 1870 ; it was a high clock on the

mantel piece; I had to stand up; the young lady came between me and the fire place, to see the weights going up; it was rather a close place; I shoved back; she shoved back against me; I put my arms around her—I hugged her; her mother was in the other room; her mother had told me to set the clock; she got between me and the mantel piece. (Show the jury how you hugged her?) I took hold of her with both hands—I just hugged her, (illustrating, by hugging Mr. Candler as though about to kiss him.) (What did you do with your hands?) I did not feel^o of her person. (If on any other occasion you saw anything not right, tell it to the jury?) That was repeated after that; I hugged and kissed her at other times when no one was present; I suppose a dozen times or more; the time of the Sunday-school celebration, I recollect that was about middle of June, 1868. (What did you do there?) I did not do anything particular; I went in the room; I was talking to Mrs. Chivers; the young lady was on the bed; I had my back to the bed; when Mrs. Chivers left I withdrew without looking at the young lady on the bed; I bid her good evening; as I got to the door she called me back; she had a shawl over the lower part of her person; she had nothing on her from here (waist) up; I can't tell how her breast was covered; it was covered with some of her underclothes; all her other clothes were loose; she had a shawl hanging over her; she had no business with me to call me back, that I know of; that was in June, 1868. (On these occasions that you kissed and hugged her was it publicly?) It was at her home, privately; she made no objection to it. (What was her manner?) On one occasion she came and put her arms around me; I saw her with her head in a young man's lap; that was in 1870. (Objected to. Judge: "If this is to impeach the witness, is the proper ground laid?" Colonel Candler: "This is for a different purpose." Objection withdrawn.) I saw her with her head in a young man's lap; he was no relation to her.

Cross-examined: (Who was that young man?) Mr. Swann; he is now dead; he died this year some time; I don't know his

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age; I suppose between nineteen and twenty when he died. (How long have you known Emma?) I have been raised with her; I shall be twenty-three years old in May. (Were you ever in love with her?) I have never had her as my sweetheart; I never told her that I loved her. (Did you use to visit her frequently?) Yes, sir; on business matters with her mother, I visited the house; I never hugged the old woman; her daughter forced it on me to hug her, every time I hugged her; she did on the first occasion; afterwards I found out I could; I remember the first time I hugged her; that was the time I was fixing the clock; she put herself against me; she was in front of me; my arms came down; she made me hug her, by her acts; she did not tell me not to do it, nor object to it, either; I don't know how long I hugged her—I suppose I hugged her two or three minutes, or fifteen minutes; Mrs. Chivers was in the other room; I suppose the door was shut; I don't know if the door was shut; it was a small house; she never said a word while I hugged her, nor I either; she did not do anything; she just stood there; she was standing still as a post—no tremble; I did not feel her breast; my arms went round her body; she had breasts then; very little change from then to now; she was as well developed then as now; she was not a little girl—about fifteen years old then; I don't know her age; she has not the appearance of being as old as I am; I had hugged her a dozen times before she had that baby—once in 1869 and once in 1870. (Was it before June, 1868?) I never hugged her before the early part of 1870. (Counsel for State: “Please your Honor; I now move to rule out what witness has said as to hugging in 1870, as this offense is charged in June, 1868.” Counsel for defense: “Wish this to contradict and impeach witness for the State, and show her character as to virtue.” Testimony allowed to remain for the present. You said you hugged her a dozen times since June, 1868, where was it all done?) In the house they live in now; she was a member of the Presbyterian church at that time—I was a member also; she was in good standing in the Church, as far as I know; we communed together at the Lord's table;

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I had not been at the communion table while this hugging was going on; the hugging was in 1870; she was sick all the year; she was not confined to bed, but did not go out. (Did you think that you and her were doing wrong?) I knew it, and yet did it. (Was it child's play?) I never had any evil motives, nor intention to have intercourse with her; it was not a lascivious hugging; I had no evil motives attached to it; I did not love her at that time. (Was the Sunday-school celebration in 1869?) No, sir; we had celebration at the church in 1868; I was in Athens in 1869; I suppose she must have been in the family way when I was hugging her; I did not know that. (Were there no indications?) Not at that time; her stomach was not swelled then, nor her breasts large; that was in early part of 1870; I don't recollect the last time I hugged her; I think in February, 1870. (Were you riding in a buggy with her?) Yes, sir; the old lady was in, and then I did it by request of her mother; I never hugged her while she was in the buggy; it was reported that she had the dropsy; I was with her after February; I never hugged her when I was riding with her; it might have been a good chance, if I had been so disposed; I don't know why I hugged her in the house. (When is the last time you were with her in the buggy?) I don't recollect. (Would you have driven a loose woman around?) Not if I had known it; I did not then think she was a bad woman. (Did you not think she was as good as girls generally are?) I thought she was virtuous then; she had done nothing to lead me to doubt her virtue then. (Did she not belong to the same Sunday-school as your sisters?) Yes, but not the same class; she associated with them; I would have stopped my sisters from associating with her if I had doubted her virtue.

Redirect examination: My sisters never associated intimately with Emma; I have a sister near her age married; my other sisters are younger; my eldest sister never associated much with Emma. (Objected to. Judge: "It is objectionable." You state that the only time you hugged this girl was in 1870?) The clock hugging was in 1870; the day I saw her

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person was in 1868; in 1869 I was at school. (The riding about in a buggy in 1870, was she not then out of her mind?) Her mind was then affected; these things (riding in buggy) was done out of kindness to her and her mother. (At the time she exposed her person, what did you think was her object? Question objected to. Judge: "You may show what was said or done; as to her motives, that must be taken from facts." In what light did you view her actions? Objected to. Judge: "The ruling of the Court was this: every act, look, word that she did or said, no matter how the purpose was indicated, may be given in evidence; but witness' opinion of her motive cannot be given." Did you put your hands on her in a lascivious way?) It was not done in a lascivious way; my passions were not aroused; of course, there was some excitement the first time I ever did the like; her rubbing against me caused me to put my arms around her.

ANDREW J. COLLIER, sworn: I live in Pike county, Alabama; I stayed here in 1867; I was going to school to Mr. Wood; I boarded with Dr. Collier, my brother; I came here 18th July, 1867; Mr. Wilson and Miss Beck were teaching school with Mr. Wood; I know Miss Emma I. Chivers; she was going to school then; I reckon my brother lived about two miles in the country; I brought in dinner sometimes; sometimes I came up in town at night; generally stayed at school house at dinner; during that time, I became acquainted with Emma I. Chivers; I met her on the street one morning; she was going to school; I was coming along; she remarked to me, I looked very sweet, and she wanted to kiss me, and called me by the endearing name of "darling;" that was on street coming from school house, by Mr. Kirk's shop; that was in the morning; she was going to the school house; I met her near Mrs. Morgan's and Mr. Kirk's shop, on the sidewalk; she addressed me in that way; I stopped and talked to her a little while; I don't recollect what else she said, running on with her; that was the first approach; I reckon she was sixteen or seventeen years old then; I did not know her age; I was

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twenty years old then—I would have been in September. (Any other time at school house?) Boys were playing hot ball; I went in school house; Miss Emma was in; she asked me where Miss Maggie M..... was; I told her that she had not returned; she called me over there and told me to sit by her; I went and sat by her; she took my hand and put it in her bosom—inside her bosom—next her skin—right at the place itself. (At that time were her breasts developed?) I reckon half grown; she had breasts; I felt of her legs, hugged and kissed her; that is about all at that time; Clinton Ballinger came in after a while; me and him scuffled around; (aside,) I reckon that has nothing to do with it. (Solicitor General: “Perhaps it has, let us hear it.” Witness, in reply to Solicitor: “I know what I was subpoenaed for.” Question by counsel for defense: “What for?” “To tell the truth.”) Clinton Ballinger had nothing to do with her, that I saw; I don’t know where she stayed; I met Emma at the railroad, just above the depot, towards Augusta—the crossing below the depot; I always went up the railroad home; sometimes I would go by the depot; I had conversation with Emma; she told me she would let me sleep with her, provided her mother was absent that night; that was at the railroad crossing, right on the track; that is near where her mother lived; I never went up; I did not go; I was taken sick that night and did not go; I agreed to go. (Did she, on any occasion, expose her person?) She was coming to school house one day about two o’clock; she sort of pulled up her clothes and wanted to know if I did not want to feel of her legs; she was right between a house and school house; right at the corner of the school house; the boys were in rear of the school house; the ball was thrown over; when I passed her, she raised up her dress and wanted to know if I did not want to feel her legs; she told me one day, in school house, if I would call on her some night like a decent young man, and, after I went out, wait on the railroad about half an hour or so, she would come out and meet me on the railroad; that arrangement was never consummated; I was sick, and I went home; that was all that pre-

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vented it; I don't know what kind of sickness it was; my brother is a doctor; I don't think it was a rupture; I went off on account of my sickness; I suppose it was in September, 1867; I left here, I think, in November; I never went to school till August. (Anything else occur in school house at noon?) It looked like she got back pretty early; she returned before school hours; sometimes she would be about me, and I kissed her two or three times and hugged her; I did not see other young men kiss her; I would not swear I ever saw other young men kiss her; I think I saw her and a young man; I think it was her; I was about fifty yards from them, I reckon; it was about an hour by sun, or half hour; I went to depot to get some money by express; at the time I put my hand in her bosom, she loved me; I asked her what it was: she said, her titties; I put my hand on her naked person—on her legs, under her clothes; at this time, there was no one about that I saw; she made no resistance or objection—she seemed to enjoy it; this was not done in play; I am now a married man; I have a child.

Cross-examined. I came from Alabama to go to school; I had had a little difficulty; I and the Yankees did not quite get along; the Yankee soldiers, they did not like me much, or my father; they broke into my mother's trunk, and I was determined to have revenge. ("Never mind that.") I came here to go to school to Mr. Wood; until I came here to go to school, I did know him, I had not heard of him; I came to my brother; I wrote to my father and he told me to go to school; I shall be twenty-five on the sixth of next September; I was twenty in 1867, lacking a few months; the first time I saw Emma, was in August, 1867; first or second week I started to school, I think that is first I had ever seen her; I never was introduced to her till she introduced herself; that was in August or September; she introduced herself to me some time in September; I don't recollect how soon after that I met her in the street; I reckon a week or it might have been a month after; a fellow can't keep up dates that far back; she introduced herself to me at school, she said she presumed

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that was Mr. Collier, she said, this is Emma I. Chivers; I spoke to her politely; I thought she was a decent girl; I do not know who were present then; I cannot recollect; I expect there was some one present; I can't tell, it was in school house, about one o'clock, after dinner; I would not say if any one was present; there was nothing extraordinary took place then; she called me "darling" after she had got acquainted with me; she sought the introduction to me; she stood off about eight or ten feet; she walked in at the door; I was sitting down writing when she spoke to me; I spoke to her every time I saw her; I think I passed her and spoke to her; nothing peculiar passed then; I think that was next morning; nothing more said than simply "good morning;" I don't know if any one was present; I don't know if Clinton Ballinger was there; he says he is younger than me. (When was the next time you met her?) I met her every morning, as I walked from school house, I said "good morning," she would say "good morning." (Well, when was next time?) What do you want next time for? ("I want you to answer my questions.") I don't know when was next time; I told you I met her every morning, and spoke to her like I spoke to any other girl. (I ask the general question when you met her every time it was simply "good morning, was it?") Yes, sir, though I did not say much to her that morning when she called me darling; we had had no conversation before that; I kissed her in the school house, not in the street; I kissed her about a day or two afterwards; I did not kiss her that morning; I saw her in school house first opportunity in a week or so after, a week or two after I was playing hot ball; I went in school house to get some water; there was no one in there; she said, where is Maggie M.....? I said she had not returned; she said, come over there; she took my hand and put it in her bosom; she said I looked "mighty sweet;" I can't recollect every word she said; she said something more of that nature, and just took my hand and put it in her bosom; I felt of her legs; I took my hand out of her bosom, then felt of her legs; her dress was unbuttoned, one button was unbuttoned; she

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put my hand in, and I felt her breast; there were many boys out, liable to come in; Clinton Ballinger came in; I put my hand on her legs; I was sitting on the girl's side; there are two doors to the house; a good many windows were broken out; it is the old academy with bell on top; not all the windows out; front windows were knocked out; Mrs. Morgan's house was across the street; there were the same houses there as now; I kept my hand on her leg three or four minutes; felt it good; I had gone to the water bucket when Ballinger came in; the next time I saw her on the railroad—I believe that was next time—that was between sun down and dark; she came on down after school, and was late in getting home; we met right at the railroad; she was going across when I met her; she told me if I would come round and if her mother was away I might sleep with her; I had never said anything to her about that before; I swear that she suggested that first; I was quite small; I was not as big then as I am now; I have grown since then; most of these corrupt women like small men; the reason they want them, they think they can't do them any harm; I have learned that at different places; I have learned it from men such as you, (Solicitor General) I reckon; I am not in the habit of associating with corrupt women; I have heard different men say it; I never heard any one in Decatur say it; they have said so in Alabama; she thought I was a boy, you know, I look like a boy now; she thought I was small and only a boy; she proposed to me that I should sleep with her without my ever suggesting it; it was to be that night; I was taken sick; that is the reason I did not go. (What was the matter with you?) I don't know; I don't know what part of me was affected; I felt bad all over; I had a doctor to examine me. (Did she propose for you to sleep with her?) Yes, sir; I got sick on the way home; I told my brother; I was not sick when I was talking; I felt sort of sick but got worse going home; I got home that night about supper time; about seven o'clock, I reckon; brother's wife asked why I came so late; it occurred between August and November. (When was the rail-

road scene ?) I reckon it was nearer November than August; she was living the other side the railroad in the rear, back of large house; I won't be positive it was in November; I can't say positive; I know it happened; I walked from there two and a half miles to my brother's; I was sick seven or eight days about home; I saw her again in about eight or ten days in school-house; I and she made arrangements to meet at her house; she told me to come and meet her like any other girl in town; I was talking to her about it; she told me to call on her; she told me to come to her house and go in and stay as long as I wanted, and when I left to wait at the railroad a half hour or so, then she would come; she did not say she would do anything; I did not go to her house, because I received money to go home; I stayed at brother's awhile before I went home; I think this occurred a week or two before I went home; I think she was living at the same place, over at her mother's place; I think in November; I don't know what time in November she made the proposition; we did not decide on what night to come; I did not tell her what night I would go, as she would know what I was after when I got there; I got money to go home not long after this conversation; it might have been a week or three days; I can't recollect; I did not get it in two days; I went to school only a day or two after; I told Mr. Wood I was ruptured; I believe I told him twice I was ruptured; no, I don't think I did tell him I was ruptured; I went to him to settle my tuition; I had money; I had some more money; I wrote to my father that I was going home; I could have got money from my brother; I know that; I can't tell how soon after the arrangement with the girl that I told Mr. Wood, nor how soon after that the money came; I don't think it was a week; I was sick all that time; she made arrangements with me; I thought a man ought always to agree to that; I was sick some days and well others; I will not swear I was too sick last time I was at my brother's; I could have gone to see her; I did not want to; I wanted it but did not have opportunity; I did not feel like walking to town; I expected to ride a

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horse ; I think my brother was practicing medicine ; I thought I could get the horse ; my brother was not practicing all the time ; he might want his horse and I hated to ask for it ; I told you why I did not go ; I had not the opportunity ; I could not get the horse ; I could have got him, but I hated to ask brother for him so much ; then I was sick, too ; I don't know what was the matter ; nothing the matter with my privates, I was all right there for operating ; I was sick ; suppose you had fever, don't that make you sick ; I don't know if I had fever or not ; I did not have fever. (I would like to know what was the matter with you ?) You will have to go to Dr. Collier then, he might know ; that was the last time I hugged her or had conversation with her. (Have you mentioned all the times you felt of her person or made engagements with her ?) I never made engagements with her to sleep with her ; she made engagements with me ; I think I have told all the times ; when she pulled up her dress and asked me to look at her legs, I don't call that a conversation ; that is just speaking, that is the way I put it ; it was right at the corner of the school house when she pulled up her clothes ; she pulled them up as high as the middle of her thighs ; I did not ask her to do it ; I went round the school house to get a ball ; I never felt her then ; she asked me if I did not want to feel her legs ; I said yes ; boys were playing back of the school house ; there were Clinton Ballinger, Bob Brown and Andrew Barry, I think Moses Davis, I think Mr. Evans was going to school, he was playing ball ; no one else got to look at her legs that I saw ; when Clinton came in I was at the water bucket ; the reason I did not tell what took place we were running on another schedule. (Testimony objected to. Judge : " If it is irrelevant, it won't go the jury.") We got to scuffling and he threw water on me, so I just turned the water bucket on his bosom ; that was all that happened then. (In your direct examination you said you knew what you were subpoenaed here for ?) I knew it myself ; I knew I had to swear the truth, that was what I knew ; nobody told me what to swear ; they wanted me as a witness. (Do you swear that no

one told you what they wanted you here for?) Well, I don't understand you. (Do you swear that no one told you for what purpose you were subpoenaed here as a witness?) No, they never told me; I have heard it; I heard it from Messrs. Hillyer & Bro.; I was at home; they wrote to Captain Gardner, my attorney; he wanted me to make a statement of the facts if I knew anything. (How came they to know what you knew about it?) I saw it in the paper; I saw that Mr. Wood had been convicted and sentenced; I went up to Troy, Alabama, to see Mr. Gardner, and he and I got to talking; he said, "do you know about Mr. Wood's case and the girl?" I said I did; I told him what I have told you, and he said, "I think your evidence would be of the greatest importance to Mrs. Wood," he would write to her, and believed that it would be the means of getting a pardon for Mr. Wood from Governor Smith; Mr. Wood came to see me out there; I believe last Friday night a week ago; he came to see me on this business; he only stayed about one hour; he said he wished I would come; he knew he could not get me out of the State and wished me to come; I paid my expenses here out of my own pocket; no one ever promised to pay it; I look for it; Mr. Wood did not tell me anything about the expenses; I heard my brother was sick; I thought it a good chance to come here to testify in this case; I never told any one about this but my brother in Atlanta; he is clerking for Parker in Atlanta; I think in a fancy grocery; I told him about it; I believe I told him in 1868, in Alabama, at Opelika; brother's name is George Collier; I told him he would get good picking if he would come up here; he could get in with a girl; I told him that she was very intimate with me; I never told him that I felt of her legs; I told him about Miss Chivers; I never told him all that I have told here; I told him in Alabama he would get good picking out of Miss Emma Chivers; I swear that, and that is all; I told him he would get good picking out of Miss Chivers; I told him where she lived; I never told any one else about it but him; I am a farmer in Alabama. (Are you sure that all this happened in July and August?) I said

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between August and November. (Did you not swear it happened in July, 1867?) No, sir, I do not swear that I did swear it; I think I swore between August and November; I won't be positive about it; no, sir, I did not swear that it occurred in July or August; I don't think I did; I swear now that it did not all happen in these two months. (How was Miss Emma's dress when you put your hand in her bosom?) There was one button of it unbuttoned in front; that was while she lived over the railroad, in August or September; I don't recollect what kind of dress; it was calico; I think it was mixed colors. (Did you swear that you saw Emma and Charles Ramspeck going down the railroad?) I saw a woman and a man; I will not swear it was Emma Chivers; I never was acquainted with Ramspeck then; I think he was living at Atlanta then; that was on Sunday evening; I don't remember the Wadsworth house; I swear I don't remember when she moved or did not move.

Redirect examination: (Did you mention these matters to Mr. Gardner?) Yes, sir; he is an attorney in Troy, Alabama; I gave him the name of Mr. Wood; I think he received a letter from Mr. Wood; there was a letter received from Messrs. Hillyer & Brother; I am not certain that he received a letter from Mr. Wood; letter was shown to me; that is the way they found out I knew about the case; Hillyer & Brother wrote to me and I replied to them; then Mr. Wood came out to see me; that was a short time ago; I talked to the attorneys since I came; my brother George is younger than I; he came to my brother's here; I told him before he came here about Emma Chivers; I just told him what I told the solicitors. (What conversations?) I was alluding to improper conversations; I have talked to her on other subjects—to her and Miss Maggie M.....; there was nothing improper said in presence of Miss Maggie; I have been testifying about conversations between July and November; I heard of Mrs. Chivers' moving; I don't know anything about it; she was living over the railroad when I came; I don't know where she was living when I left here; it was at the house over the railroad

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that I expected to meet her; I was not here at all during 1868; I have not been here since 1867; I have not been back till now; I left here in bad health; I lived in Lee county, near Opelika, Alabama, at that time; it was Russell county then; there has been a new county made since; I lived about one and a half or two miles from Opelika; where I live now is about one hundred miles by railroad—through the country, eighty or ninety; my father is still living in Opelika. (Corrected answer:) Mr. Wood told me that his friends would pay my expenses.

MOSES E. DAVIS, sworn: I live about three miles from Decatur; I am acquainted with Emma I. Chivers; I don't know how long—ever since she was a little girl. (Do you know anything about persons kissing or hugging her; if so, state to the jury when or where.) As well as I remember, in 1866, the latter part, as well as I remember, Mr. Andrew Barry, I saw him hug and kiss her once in Mrs. Chivers' yard, by the railroad; I don't remember seeing any other persons hugging her, only kissing her. (Did you ever do anything of the kind?) I hugged and kissed her in latter part of 1866, in a room where she was living; I don't think any one saw me do it; there were others in the room, but they did not see it; the room was not very light. (Did she make objection?) None that I could see; never said anything—never resisted it; I was about twenty or twenty-one about that time. (Do you remember the fishing party at Fowler's mill?) Yes, I remember the time; I don't remember the date; it was in the first of May; I don't remember what year it was; it has been some two or three years ago; it was a Good Templar's fishing party at Fowler's mill; a portion of the Good Templars went there; Emma was there; Ramspeck was there; I don't remember seeing them at first; a crowd of us walked up the side of the pond where they could fish; we sat down to fish, after clearing off the bushes, some went to fishing, and after a while Mr. Ramspeck and Emma went off up the pond and were gone some time; they

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went off alone; there was no one else went up the pond; they were gone about one hour and a half.

Cross-examined: I am first cousin to Mr. Barry; I am no relation to Mr. Moore's wife; I am not acquainted with her through Mr. Barry; I am about twenty-five; I was born in 1846—I believe in July; I shall be twenty-six in coming July; Emma Chivers was not a child when I was hugging her; she was about seventeen years old; I have heard that; I don't remember when she was born; probably she was not quite seventeen, but not far from it, I think; when I hugged and kissed her I was not in love with her at that time; I never told her that I thought anything of her in my life; my father is not living; he was not living at that time; I don't remember when he died; I was a boy; I belonged to the Presbyterian church since 1866 or 1867; I was a member of that church at the time I was with Miss Emma; I have been with her in school; I did not visit her; I was with her; I don't think I was ever in her house; I kissed and hugged her where Mr. Moore lived; there were two girls in the room and Mr. Barry; they did not see—it was very dark; Mr. Moore's daughters were in there, and I and Miss Chivers; I had her sort of back in the corner; it is not a very large room; I probable said something to her, I don't know what it was; that was the first time I kissed and hugged her; I just put my arms around her; I did not ask her; she was sitting down. (Were you playing some game?) No, we were not playing then; we had not been playing kissing then; a sort of scuffling playing with a chair; I don't know what kind of a game that was; we were pulling chairs across the room with girls in them; the others were not doing the same thing; there was no other hugging done except in this case; I was there to see; I don't think they did, they never spoke of it; I don't know that I spoke of it; I did not tell that I had kissed Miss Emma Chivers; I don't think they knew I had done it, because they never said anything about it; I put my left arm around her waist and kissed her two or three times; it did not take more than two or three minutes; that was the first time; I

never asked her; she made no objections; took it freely; I sort of had an idea that I could kiss her; I had no object; I had no intention then to have intercourse with her; I never hugged her any more; that is the beginning and the end—that is all I got, sir; the fishing party was in May; I do not remember the year; it was 1869 or 1868—I am not certain; I saw Mr. Barry hug her in latter part of 1866—along about October; I don't remember telling any one but my cousin about it; that was a short time after it was done. (Did you not make affidavit before the Ordinary, Mr. Webster, on the 4th of October, 1871?) I suppose I did, sir. (Did you not swear in that affidavit that you had seen other young men frequently hug and kiss her?) Yes, sir; I swore that Barry is the only one I ever saw hug and kiss her; I don't remember any one else; I have seen boys kiss her in the school house, but I don't remember who. (Any one but Barry?) I think I did; I still think I have seen other boys kiss her. (Think if you can recollect any one else?) It made no impression on my mind then, and I can't remember. (Did you ever see Robert Barry kiss her?) Not that I recollect; I don't remember seeing Archy Avery nor Benjamin George; he was not at school then; I think I can say that C. R. kissed her. (Did you ever see Tom Kirkpatrick kiss her?) The names I could not state; I have seen boys kiss her—I don't remember who; there were a great many boys there; Barry is the only one I can positively say I saw hug and kiss her; those who kissed her in school did so in play, I reckon—never saw other girls kissed; I suppose they were playing some play; as well as I can remember she was kissed, and they were not—that is my impression. I can't be positive who I first told about it; I have told a good many; I don't remember a list of those I have told. (Did you ever tell any one before the baby was born?) I don't know that I ever told any one but Barry before the baby was born; he told me he had hugged and kissed her before the baby was born; don't remember how many times he said he had kissed her; he told about kissing and hugging; believed he could go further; did not go further; I did not; I never

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tried to go further ; I don't think I did want to go further ; I never visited her after that ; (Have you sisters ?) Yes ; they were about her age ; they did not associate with her much ; very little ; they never were at her house ; they spoke to her. (Did they not sleep with her at Mr. Wood's house ?) I suppose one of my sisters did ; after I kissed and hugged her, I did not tell my sisters. (Would you allow your sisters to associate with a loose woman ?) No, if I could stop it ; I think my sisters would have dropped her if I had intimated that she was a loose woman ; I never told my sisters about her ; I never told them not to associate with her ; we lived in the country and they seldom came to town ; they might do so, but I don't know if they ever slept together ; they stayed at the same house that Emma I. Chivers was in ; I thought the liberties were more than she ought to allow ; it did not impress me with the idea that she was not virtuous. (Did you see anything after 1868 that led you to believe she was not virtuous ?) I suppose not ; I think not. (Your hugging was not this lascivious kind paving the way to sexual intercourse ?) No, it was not.

Redirect examination: Andrew Barry was uncle to Mr. Moore's daughters ; they were little girls ; they were a good deal younger than Emma I. Chivers. (Was your sister that you spoke of being at Mr. Wood's older than Emma ?) Yes ; Emma went to school to my sister ; about the first school she ever went to ; my sister was a grown lady then. Mrs. Moore's daughter (eldest) was not as old as Emma ; she was not more than thirteen years old ; between thirteen and fourteen probably ; I did not ask their age.

W. CLINTON BALLINGER, sworn : (Were you going to school to Mr. Wood in 1868 ?) Yes ; I boarded in 1868 at Mrs. Morgan's, and went to Mr. Wood's school ; I also boarded at your (Col. Candler's) house in 1868 ; Miss Emma I. Chivers went to school that year ; I think Mrs. Wood assisted in school latter part of the year. (Was she able to teach school ?) As far as her health I never heard or saw anything wrong ; she walked to the school-house and taught school. (Do you recollect the

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night that Miss Emma was at Mrs. Morgan's and you went to the school-house and came back to Mrs. Morgan's at night, and in your presence Mr. Wood said he would conduct Miss Chivers home, and would not trouble you to escort her?) No, I don't recollect such an occasion at any time; I do not recollect anything like that at any time; if anything like that had happened I think I should have recollected it; I attended school while Mr. Wood taught all that year. (Did you ever see any intimacy by Mr. Wood toward Emma I. Chivers?) No more than towards other girls going to school; I saw no notes passing between them; Andrew Collier went first five months in 1867; I went to school then; I recollect when he went home; I think his father sent for him; I think he had been sick. (Do you recollect touseling with him and he complained of being ruptured?) No, I don't recollect anything about that or what was the matter with him.

Cross-examined: I do not know that Mr. Wood was partial to Miss Chivers; if he ever was he never told me so, nor I could not discover it from his actions; I can't say that they were congenial; Mr. Wood did not show her favors in school; he told me he was educating her gratis; as far as attentions to her more than to other scholars, I never saw it. (Did you ever see him at Mrs. Morgan's when Miss Emma was there?) I think I have; I never knew him to go home with her after night; he did not go home with her that night that I recollect of; I don't recollect who did go home with her; I don't think I did; there were no other young men boarding there but me; none there that night that I know of; I think I have seen Miss Emma Chivers at Mrs. Morgan's; I don't think I saw Mr. Wood there the same night; I don't recollect I ever saw them there both at night; I could not say positively; I have no distinct recollection about it; I have been away from here two years; I did not suspect anything between them; I will not swear I saw them or did not see them there that night. (Do you say she was not there one night, and you went to the school house to see Mr. Wood?) I don't recollect anything about it; I don't state positively that I did not; I knew Miss

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Emma as a school girl; I never saw any young man take improper liberties with her; I have seen her playing in a crowd; I never saw anything improper in her conduct privately; I never saw anything improper in a crowd. (Ever see anything different to other girls?) No, I did not. (Was she not regarded as a smart, model girl—well educated?) She was considered very smart; I never heard of her as a model girl. (Mr. Ballinger, when you were in school one day at dinner, did anything particular occur? Did you see her and a young man by themselves?) I may have done so—I may not. (Did you go in school house one day at noon and get in a tousel with a young man, and see her in there?) I have a sort of recollection of scuffling with young Collier; I think Miss Emma was in; there were children in—there were other children in; I don't remember who they were. (What happened?) I believe I got wet; the children did not engage in it; I don't remember who were there.

MAMIE WOOD, sworn: I was fourteen last September; Mr. Wood—Myron D. Wood—is my father; I recollect when Mrs. Chivers and Emma lived at our house; I recollect the well being cleaned out two or three times; a white man cleaned it out once; a negro man cleaned it out once while Emma was living there. (Did you see or hear anything about finding a ring?) I don't remember anything about it at any time; none of the family said anything about a ring being found in the well; I was at home all the time; Emma lived at my father's. (Did you, at any time, see your father show anything towards her that gentleman ought not to do?) No, sir; I never saw him kiss her, or put his hand on her at all.

Cross-examined: I am fourteen years old now; I was ten in 1868; I was born in 1857.

MISS MARY A. H. GAY, sworn: I reside in DeKalb county, in the northwest part of this village; I live very near the house that Mrs. Chivers lived in during 1868; I live on this side of that house; in going to Mrs. Chivers'

house from town, persons would have to pass my house. (In going from her house towards the church, would they pass your house?) They would not go as near as from town; there are two streets passing my house—one across and one direct. (In 1868 did persons live with you?) My sister and my brother's widow and her little son; in 1868 he was about six years old; he was born 30th March, 1864; that would make him about four years old then. (Please tell the jury in your own language, about seeing persons visit Mrs. Chivers' house, the hours they went and left there; state all you know.) My little nephew was sick in August and September, 1868; he was sick a long while; his mother and myself occupied the room nearest to Mrs. Chivers', we could see a great deal of passing; I never saw so much at any other one house; not only young men from this place but from a distance; at all hours of day and night; I saw them leaving there till daylight, should I be up with the little boy. (Any particular young man that you could see?) I got so acquainted with the footsteps of a young man, I could tell without looking, but when I did look, my impressions were confirmed; I think I saw him after midnight on more than one occasion; that was Mr. Charles Ramspeck; I read all night, I was so anxious about the boy. (Have you seen the same young man going at other times?) During week days, I don't remember to have seen him; on Sunday he often went and attended the young female of the house—I mean Emma Chivers, by the young female; in the afternoon Mrs. Chivers generally walked off and left them together; the doors would invariable be shut, and windows closed; he would remain all of the Sabbath afternoon; I think I saw that every Sunday while they were there; I was absent when they moved to Mr. Wood's house; I returned to Decatur in the early part of September. (Were you home in March?) I think I was; I don't think I saw anything of that sort during that time; there was nothing to cause me to be up during the night. (Do you recollect the Sunday-school exhibition?) I can't remember when it was; I don't remember only the latter portion of the year; I have no diary

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on that subject; I have a diary, but not with me; I think I was not here when Mrs. Chivers moved to Mr. Wood's; when I came home I found her living there; I think it must have been in October when she moved there, or in November, but I am not certain.

Cross-examined: All these things happened in latter part of the year 1868. (May it please your Honor, we move to rule out this testimony, as it refers to matters since the offense is alleged. Judge: "That question will not be acted on now.") (What is your age?) That is rather a delicate question; I was born in 1828; I have been here twenty-one years; I am not a married lady. (Did not you and Mrs. Chivers have a difficulty once?) I heard a great deal about her; I told her what I heard, and it made her very angry; I never quarreled with her; I told her she kept a house of assignation; that was told to me in Atlanta; Mr. Harvill told it to me; it was in the fall, a little after the surrender. (We object to testimony as to Mrs. Chivers, she is no party to this seduction, we have nothing to do with difficulties between her and this witness. Judge: "You may show the state of witness' feelings.") I am a member of the Baptist church; I have seen Miss Emma at Mr. Wood's house frequently; (Did you ever tell Mr. Wood about these things?) No, I don't think I ever did; I was a friend of Mr. and Mrs. Wood; I spoke of it before Emma's baby was born; I did in our family; I never told it of her; I thought she was a poor orphan girl; I did not know that Mr. Wood was educating Emma for a teacher; I knew he was teaching her; I think I knew he was teaching her free; I am well acquainted with citizens here; I knew the young ladies; I am a friend to her but did not associate with her much; I did know of some girls who would not associate with her, nor even go with her to school; they are young ladies; they are related to Mr. Wood. (When did they quit going with her?) That was when she lived by us; Mrs. W..... forbid her daughters to associate with her by the doctor's request; that was when Emma was going to school; Mrs. W..... told me so; I heard her tell it before me; I don't know when Emma

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had a baby ; I don't remember if I heard it (forbidding young ladies to associate with Emma,) while Emma lived there, (at the Wadsworth house.) (Do you know that Emma and these girls were at the same Sunday-school?) I did not attend that church ; I did not know these facts ; the Misses W.....n did not go to school with Emma ; they quit associating with her before she left Mr. Wood's ; I knew the Misses Moore ; Emma and Sally Moore quit keeping her company. (Do you say they quit associating with her, of your own knowledge?) I know this, that when she was at church (Please answer my question.) I don't know this positively. (Do you know they did do it?) I know their father told me (Once more, do you *know* they quit associating with her?) I think their father could state that ; I did not *know* ; I know that Mr. Moore said (I don't want to hear that.) I know Mr. Moore was a member of the Presbyterian church. (Did you say that you saw a young man come out of her house in daylight?) I have seen him come out of their yard. (Who?) Mr. Ramspeck was the most constant visitor ; I did not see him come out of the house ; I have seen him come out of the yard in daylight ; it must have been in September ; I have known of others, quite a number, coming at every hour, from nine o'clock till daylight. (Did other young men come out after twelve o'clock except Charles Ramspeck?) I can only guess from those who went in at daylight ; I can only tell who was there in the day time ; there was a young man name of D.....n, he is connected with the Durham family. (Who else?) I was told not to tell ; Mr. Kirkpatrick's sons, Tommy and Jimmy ; I don't know they were the ones that came out between twelve o'clock and day-light. (Are they the gentlemen that left between twelve o'clock and daylight?) I should prefer not to say. (Question repeated.) I never saw them come out at night. (Counsel for defense objected ; objection overruled.) (Are those young men in the catalogue of those coming out at all hours of the night?) I don't know what to say ; I know Ed. Burnett went there in the day time ; I would rather suspect him

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than those young men, (Kirkpatricks ;) I could see, as we had no palings ; I could see there would two or three go at a time, or one at a time ; I never saw Ed. Burnett come from there between midnight and daylight ; I think Robert Brown went there a good deal. (What year?) He visited a great deal, I cannot be definite ; I don't know if it was in 1868 ; I have seen him meet her at the depot at dark ; I can't be positive where I saw him ; I have seen him with her in day time, walking with her ; I have seen him at the Chivers place often ; I can't be positive when ; saw him at the Wadsworth house. (Do you believe you ever did see him there?) I see there are great efforts made to invalidate my testimony by Mr. Fry and others. Judge: "Answer the questions to the best of your knowledge and belief, promptly." I don't remember him (Robert Brown) in that crowd ; I paid no attention except when I recognized them. (Did you recognize any one?) None but Charles Ramspeck, when I have been in the yard and at the window. (Can you name any one except him?) I can't name any. (Did you ever see any one but Charles Ramspeck leave there between twelve o'clock and daylight?) I have seen the forms of men, two and three at a time ; they would go in crowds ; they went three at a time ; I never counted the times ; I know of more than once. (Did you see it more than once?) Yes ; I don't know how often ; I saw it twice ; I never told any one except my own family ; I have seen Ramspeck come out of the yard at daylight in the fall of 1868, or the latter part of summer, September or October ; at that time he was here during the week ; I noticed it more than Sunday nights ; more than once. (When and where did Harvill tell you about Mrs. Chivers?) That was at his own table, his wife and little girl were present ; it was when the railroad was torn up ; I don't remember exactly, it was some time about the conclusion of the war ; he had thought of prosecuting her ; she stayed with a negro ; none of her family stayed there with her ; Emma was not with her. (Defense objected ; objection sustained.) I have been in Memphis for the last month ; I was subpoenaed as a witness ; the

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subpoena was sent by mail; Mr. Candler sent it; I have been there four months; I went there to have some publishing done; Mr. Candler telegraphed me also to come.

JAMES W. KIRKPATRICK, sworn: (Were you present at Mrs. Chivers' a short time after the birth of Emma's child, when I (Mr Candler) was present, Mr. Barry, Mr. Wood and Mrs. Chivers and her son Tom?) I was, one night. (Do you recollect if I asked Emma I. Chivers what she promised herself, etc?) You made the inquiry this way: "If she did not know that it was wrong?" she said she did; you asked her what induced her to perpetrate that wrong? her answer was, "because I loved him." (Did she give any other reason that night?) She did not; I think she never said that Mr. Wood had told her that he loved her better than any other woman alive; she never said that. (Did Emma say that night that Mr. Wood had promised to marry her?) No, she did not. (Did she say anything about marrying? Nothing at all said about that, nothing at all. (Anything said by her about Mr. Wood having made it a subject of prayer?) No, sir. (Anything said by her that Wood had said it was not wrong?) No, sir; nothing of that kind, that I have any recollection of. (About his wife being in bad health, etc.?) No, sir. (Did she, at that time, or any other, say she had been deceived by Mr. Wood?) Nothing of that kind stated that night; the only reason she assigned was that she loved him; you said, did she not know he was a married man? did she have the same love for him that she would for a young man? She said she did. (What did she say as to her suspicions of being pregnant?) In the afternoon she said she had no knowledge or suspicion or idea that she was pregnant; that she was taken by surprise when her child was born; you (Candler) cautioned her not to make that statement—it could not be believed; she said she had no symptoms of its moving as a living child in the womb; said she had no intimation or knowledge whatever before it was born. (What was Emma's condition as to health?) As far as I could judge, she talked as well as ever she did; she was

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up and dressed in her usual apparel; no complaint made at all. (Did she make any allusion to Mr. Wood, saying it was not wrong; that his love was pure and holy, etc.?) She told nothing of that kind, if my recollection serves me right; you mentioned something of that kind in the afternoon. (Was that not in reference to an old field scene?) Yes, sir? (Was the lane transaction mentioned that night?) I don't recollect that it was. (Was anything said about intercourse at her mother's house?) She stated she had had once, and only once, and that was in the front room; I think you asked her, "This room?" and she said, "Yes, only that one time." (What was the condition of Mrs. Wood's health in 1867 and 1868?) I have no right to judge, except from what I saw; she was in school daily; scarcely a day, when teaching, but she went—wet and dry. (What year was she sick?) I think it was in 1869, if my memory serves me right; it was during summer months, I think. (What was the final result of Mrs. Wood's sickness?) I know what was told—I don't know of my own knowledge, only what was stated by the physicians; I know where Mrs. Morgan lived; I think that was in 1856; the same place where Mr. Ladd now lives; I think Mrs. Morgan was there in 1856; I recollect Dr. Chivers came there; I think Mrs. Morgan was there part of 1855.

Cross-examined: (Who were present at that interview you testified about?) We had two interviews: one in the afternoon—the one in which Emma said she yielded to him; myself and Mr. Candler went first; we went there for the purpose of having an interview with her; it was done at the instance of the Presbyterian church—Mr. Wood's church; we went as officers of the church; I was an elder, Mr. Candler was a deacon at that time; we stayed there near two hours; we did not examine her as to the getting or birth of the child, the examination was as to the father of it; she at first refused to tell; I don't know that we told her that the church had sent us; I had heard before that Mr. Wood was father of the child; she told us then that she had never stated who was father of it; she said she would not tell who was father of it till he was in her pres-

ence; Mr. Candler asked her how the report got out that Mr. Wood was father of it; she said she had never said so; Mr. Candler told her he did not come to ascertain who was the father of it, if Mr. Wood was not; she said she would not state who the father was, till he was there; we got away about sunset, without hearing who was father of the child; we asked her if Mr. Wood would come down there after supper, would she then state who was father of the child; I went myself and notified him, and got him and Mr. Barry, (he was an elder of the church with me,) and we four went—Kirkpatrick, Barry, Candler and Wood; when we went in, we stated that Mr. Wood had come, at our request; then she said Mr. Wood was father of the child; Mr. Wood was sitting there; I think he said it was false; I think he said it was an infamous falsehood, or infamous lie; her mother and brother were in the room; I don't think Mr. Wood said anything else; we had a long conversation with her; she did not hesitate about answering who was father of the child; I think the question was only asked once; I think the child was about three or four weeks old; I don't know, of my own knowledge, that she had been sick; she showed some evidence of having been sick, but not unusually so; ladies are very sick at these times; I have known Miss Emma, I suppose, since she first came here; she was a member of our church; Mr. Wood never was a member of our church; according to our discipline, ministers are not members of the church where they preach; Emma was a member at the time of the birth of her child; was a member in good standing; had been in Sabbath-school; I was associate superintendent and teacher; she was a good scholar; (prior to January, 1868?) as to her connection with the Sunday-school, I don't think I could answer; when she was a member of my class, she was a regular attendant; I have presented her with some books—perhaps a Bible; it probably was given for punctual attendance; (Bible shown to witness;) I expect I gave her that Bible with that inscription: "Presented to Emma I. Chivers for punctuality and good lessons, by her teacher, James W. Kirkpatrick. July 1st, 1868." At that time, she

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was a good scholar and a good girl, as far as I know. (Do you know of any fact to show that she was not virtuous?) I do not. (Are you a friend to Mr. Wood?) I suppose I should be considered such.

ROBERT L. BARRY, sworn: (Were you present one night at Mrs. Chivers' house, three weeks after the birth of Emma's child, with myself (Mr. Candler) and Mr. Kirkpatrick and Mr. Wood, Mrs. Chivers and her son?) I was. (Was she not asked by me what did she promise herself in having carnal knowledge and intercourse with Mr. Wood; did I not say to her, "do you not know he is a married man, a minister of the gospel—there were young men—did she not know it was wrong?") These facts were presented to her as you stated them; her answer was, because she loved him; she gave no other reason for it. (Did she say or intimate that she had been deceived by Wood?) She did not. (Did she say anything that Mr. Wood had promised to marry her under certain circumstances?) She did not. (Did she say that he told her his wife was in bad health, and could not live long?) She did not speak of Mr. Wood's wife that I know of. (Did she say anything of him loving her better than any other woman alive?) No, sir. (Did she say that Mr. Wood had told her he had made intercourse with her a subject of prayer?) Not a word of it; she did not begin to intimate it; after we got into the house; Miss Emma was lying on the bed dressed; after remaining a few minutes, you, Mr. Candler, notified her that we had come to hear the facts connected with Mr. Wood being father of the child; if she was able to make a statement, we were ready to hear it; tell it in her own way, there was no difficulty about her talking—no complaint made any way; she talked a good deal about it. (Any intimation that she had been deceived at all?) Not a word. (What did she say about knowing of her pregnancy?) She said she did not know that she was in that condition until she had the child. (Do you know when the Good Templar's fishing party was?) On Saturday, the 7th day of May, 1870, I believe; I was at Mr. Wood's house that night—

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I took supper there; the Rev. Mr. King took supper there; I left there about nine o'clock; Emma Chivers was not there that night; if she was she had hid away; I saw Mr. Wood and his family and this minister—I left them there; I think Mr. Wood went to the General Assembly (Synod) the week after the fishing party; I don't know the day he started; I don't know the exact day he returned; I think about the fourth Sunday in March—that is my recollection—no, in May; the Assembly met in Louisville; they assembled on the 15th, I believe; Mr. Wood was in the country a good deal, visiting his congregations; he came from Lawrenceville with Mr. King; he had been up there; I don't know how long. (What was the condition of Mrs. Wood's health in 1868?) I sent my children to her school the first part of 1869; in 1868 she taught with Mr. Wood; it is about four hundred yards from her house to the school; I can't say that she walked; she taught school in first part of 1869, in the Wadsworth house; I think she was taken sick in first part of 1869; I can't tell of my own knowledge what was the matter with her; I came home at night when not prevented by business; I was here on Sabbath; I attended prayer meetings during the week; I saw Mrs. Wood on these occasions; she appeared to be in good health; it did not look like any one could have better health than she in 1868; she was a fine looking woman then and now; I know Mr. Moore's daughters—they are my nieces; I don't know their ages; in 1865 and 1866 they were girls not grown; the oldest was born somewhere about 1850; I think they were sent to Salem, North Carolina, after 1866; that is my recollection.

Cross-examined: (Were you and Mr. Candler and Mr. Kirkpatrick sent to question this young lady about her connection with Mr. Wood?) I was not sent; I don't know about Candler and Kirkpatrick; I went to see Mr. Kirkpatrick; I went to Mr. Wood's house and found him.

(Defense propose to swear Mr. George to contradict one of the State's witnesses; State objected, as he was not put under the rule; witness was sworn.)

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BENJAMIN F. GEORGE, sworn: (Question by the Judge: "Did you hear any portion of Emma I. Chivers' testimony about a ring?" Witness: "I don't think I did; I heard a portion of the testimony read over.") I clerked for Mr. Ramspeck in 1866, 1867, and 1868; I think I quit clerking for him in the first part of 1869. (Did Miss Emma I. Chivers, at any time, exhibit a plain gold ring to you in Mr. Ramspeck's store?) I don't remember that she did, though she may have done so. (Do you recollect being in the store at any time, and her exhibiting a gold ring to you?) I do not. (Was your attention ever attracted to a ring on her hand?) I have no such recollection; I don't recollect anything about the ring; I don't remember that she ever spoke to me at any time about a ring.

Cross-examined: I may have seen a ring on her hand; I can't say positively; I knew her well; she has been in the store often; I had many conversations with her; she might have had such a conversation; I may have forgotten it; I don't say one way or the other. (Was she virtuous at that time?) As far as I know of my own knowledge, I never kissed or hugged her.

Redirect-examination: I have visited her mother's house; I know nothing about her virtue.

J. L. DARNELL, M. D., sworn: I made entries in Mrs. Chivers' Bible; it was the family record; I filled it out by her request. (Testimony objected to by the State. Defense wish to contradict statements of principal witness for the State. Judge: "You may prove a record but not the contents.") I made a record in her Bible. (Did you ever make any changes in those entries?) I never made any changes or additions.

Cross-examined: (Do you remember this, positively?) I remember it well enough to swear to it; I think I should have remembered if I had done it; I made the entries the year before the war—in 1860.

JAMES C. AVARY, M. D., sworn: I am a practicing physician—I was in 1868 and 1869; I know when Mrs. Wood was sick—when I first saw her in 1869—in March. (This witness testified as to the condition of Mrs. Wood's health during the year 1869, and its results, testimony was ruled out and withdrawn from the jury, but defense allowed to show the condition of Mrs. Wood's health about the time of the alleged offense. Do you know the condition of Mrs. Wood's health before June, 1868?) I never heard of her being sick; I did not attend her for sickness; occasionally I saw her in passing to church and other places; she bore no evidence of bad health. (Defense wished to show the condition of Mrs. Wood's health, for the purpose of contradicting the statements of Emma I. Chivers. Judge: "You may show the condition of her health before or about the time of the alleged seduction, but not after.")

L. J. WINN, sworn: (Were you acquainted with the condition of Mrs. Wood's health in 1868?) I think I was; from February of that year till May I saw her perhaps two or three times a week; I think from June I saw her almost daily; her health was good; it was not so good in early spring; she suffered from attacks of nervous headache; latter part of spring and early summer she was looking better than I ever saw her; it was a subject of remark; her appearance was very healthy; I know that was in June. (Are you acquainted with the Wadsworth house?) Yes, sir. (How are the inside doors?) The door to the room next Mr. Wood's house, (east room,) that door opens into the other room, that is, in leaving the room you push the door from you. (Testimony objected to by the State, as the witness was not put under the rule; witness being an attorney, and counsel in the case, was excepted from the rule.) There are no door facings at all, there is a staple, but no lock to the door, that is its condition now; I can state there has been no alteration while I lived here; I remember some fifteen years ago there was an additional sill put to the house; I have been living here all

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the time since the war, passing there two or three times daily; there have been no repairs since 1868, nothing about the doors; in 1868 I was in the house frequently, as there was a school there; after Mrs. Wood left it, they got up a ghost there; I went in and passed through the same door; I think it is the same door; the condition of the door is nothing but rough planks, what we call sheeting, and if they were joined together originally, they have shrunk so as to leave great cracks in the door; above the door I could run my hand in it, or between the side where the door opens; it is more like a shutter than a door; I should so call it.

Cross-examined: (Did you ever examine the door before 1868?) I never had examined buttons or fastenings; I was there in 1868; my statement as to the fastenings is based on my observations since 1868; I think there has been no new door for many years. (At the time the child was born, was there not a good deal of anxiety in Mr. Wood's family for fear he was father of it?) No; on Friday after the child was born, I heard some of the boys talking; (the child was born the previous night or early that morning;) I heard it whispered that there was a young preacher over by the depot; I heard it from several; that aroused my anxiety and curiosity to some extent; I knew she had lived at Mr. Wood's house; I mentioned that to my wife; I did not know whether it was a mere rumor or the girl had said it; there was that anxiety that such a report might produce; I told Mr. R..... on Saturday after, as we went up on the train, that there was considerable excitement at the depot; Dr. Durham, who, I heard, was present at the birth, said if what she said was true it would raise the worst stink that ever was in this country; I went to Atlanta; I went to Dr. Durham's office and asked him the question directly who she had said was father of the child; he said that she had said Mr. Wood; I went to R.....'s store; I said, Hardy, who do you suppose is father of the child? he said, "Mr. Wood;" I said that is what I have heard; I was then speaking of what I had heard the day before.

Here the defense closed, except the statement of defendant.

STATEMENT OF MYRON D. WOOD.

It is a source of satisfaction to me that I am able to make a statement in this case. I was desirous of making a statement on the previous trial. I am glad the opportunity is now offered me. I state it, intending to be brief as to the facts in the case, with the assertion that I do so under a solemn sense of my accountability to God and man, that I never seduced Emma I. Chivers. I never in any single instance, in all my life, had any intercourse with her, and the facts stated in this indictment as to such intercourse are entirely false. In 1867, January of that year, the second or third day, I came to Decatur to take charge, as pastor, of the Presbyterian church of this place. I was slightly acquainted with Emma I. Chivers, from having met her in my father's family. I knew hardly anything of Emma I. Chivers. I visited the family twice perhaps before June or July of 1867, in the regular course of my ministrations as pastor. At that time the school became vacant. Mr. Hunter, who had been teaching here, went away. I was told if I would take charge of the school it would be worth so much, if I could attend to the duties of the school and pastorate of the church. The school was offered to me; I consented to take it. Knowing that Mrs. Chivers had rendered considerable service and assistance during the war to my mother's family, I told her that as far as her children were concerned, they should have tuition without charge, if she had two or three. She sent two. The offer was not a peculiar one—it was made to others. During the first term of the school—from, say August, 1867, to the close of the year, I noticed nothing peculiar about Emma Chivers. She was a constant attendant at school, a very good scholar. I remember but one thing, which was at the close of the term, that in a Latin class composed of three persons she stood third, the others being unusually smart. Her mother then came to me and said Emma was discouraged about her Latin, and said that she could not get along—the other two were so much better than she was, she was about to give up in despair.

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The Latin lessons consisted of some translations from English into Latin and Latin into English. I told her mother I would assist her, as she was so much discouraged. Therefore, one evening, in coming from Mr. Winn's, I stopped at her mother's house, whether eight or ten o'clock, I don't remember the hour; I don't think it was as late as ten o'clock. There was a light in the room, so I had reason to believe the family were up; and as she wanted me to assist her in her lessons, I went in and did so. I remember the very passage I assisted her in translating. I had done so with other scholars when they asked me. I then went home, and I do most solemnly and earnestly avow that there was only one other single instance in which I gave her a private recitation, at my present residence—all her other lessons were heard in school. Further, as an act of kindness to her and her mother, Mr. Moore, of Atlanta, of the firm of Moore & Marsh, came to me near the depot and told me there were reports about Emma I. Chivers to the effect that her mother went off at night and allowed young men to stay with her too late at night. He said he knew nothing that was actually wrong having occurred, but the report is that young men have been there too late without a light in the house. I told Mrs. Chivers of that as a friend and as her minister, and warned her to be more circumspect with regard to her daughter, if these facts were true, into which I did not inquire.

Now, we come to the time of her moving from her house across the railroad to the Wadsworth house. I had nothing in the world to do with that—before my Maker, I had nothing to do with getting Emma to the Wadsworth house. When they got there, I visited them occasionally—more often than I had done before, and the time of assisting her in her Latin translation was after she came over there, which I related just now.

In regard to moving to my house, I had nothing to do with that; my own family know it, my mother knows it, my wife knows it, my children know it, as far as they have heard it talked about; the others know it positively. My mother

wanted Mrs. Chivers to come over and cook, as she was a white person and responsible. My father's health was poor, and my mother wanted Mrs. Chivers to assist in the family. I at first opposed it. Mrs. Chivers came over and said she would come in the day and cook, and go back home at night. There was talk of her leaving her family alone. I told her she must not stay at our house and leave them alone; that is the only suggestion I made as to her moving to my house. I did not make that as a suggestion for her to move, but not to leave her children. It having been proposed by my mother that Mrs. Chivers should move, I agreed to it; my wife agreed to it.

I spoke to persons about reports I had heard. I spoke to Mr. Kirkpatrick; I asked him if these reports were true, or had any foundation. He said he had heard of them, but did not know if they had been investigated. My remark to him was, "Well, not as to anything actually bad, but only occasional indiscreet behaviour?" He said, "Yes, as to things actually bad, there had been, but had in a measure died out." After that, I spoke to Mr. Robert Davis, an elder in my church, when at a meeting at Allen's, (Lawrenceville,) in August, 1868. I asked him as to the character of the family. He said there might have been some talk, but people hoped for the best; he said after the war all persons were anxious to conceal and cover up what had been said and done during the war; he said her daughter was a smart girl, and he hoped a good girl. I conversed also with Charles Ramspeck, in a buggy, going to Lawrenceville, on the same subject; he will remember the conversation. He stated to me that there was a young man by the name of D.....n who had said very harsh things about Emma, and that there was a young lady in this place who had said something about her character, but he did not believe a word of it; she was a perfect lady; he was glad she was going to my house, and hoped I would protect her and elevate her character. I told him I certainly should try to do so. They then came to my house. That is the history of it. They had only been there

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a short time before I found that all was not right. I have never spoken against Mrs. Chivers or her daughter, even when I had serious doubts about her conduct. A gentleman came and asked me, in confidence, if he should allow his daughters to associate with her. I told him I knew nothing; I concealed all I could; that gentleman is Mr. R. W. Swann. But I did not like Mrs. Chivers' actions in my household. My wife knows that she tried to produce discord in my family, between my wife, on one side, and my mother and father. It came to our knowledge that she did do that; that neither she nor her children spoke the truth, in instances which I will not now stop to relate—the only reason is, I want to spare feelings, and not bring these things to the public notice. My family knows these things as well as I do, and could swear to them. These facts caused us to wish her to leave the house.

Another circumstance. Emma Chivers, on one occasion, had thrown down a young lady, who visited our house, and exposed her person. I told her to stop; she did not do it; she looked at me in anger; I said, while you are in my house you must do as I say; she said, I can leave it; I said, you must leave it before night. I told her mother that unless she could be in obedience, she must leave; she afterwards came and begged pardon. I consented to let her remain till the year was out. I was glad when the time came for them to leave.

With regard to these matters set out in the indictment, as to the lane, and walking in the lane, I know nothing of these circumstances. I did walk home with her one time from the school-house. I think the reason of that was, we had an exhibition, parties went to practice for it—I went; Emma was one of those parties, and her mother's invariable request to me was, "Mr. Wood, don't let the young men go with Emma," and for that reason, without asking her specially to go home, I walked home with her—she did not even take my arm. That is the only occasion I remember walking home, or in the street in any way. I did that same thing in another case.

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Mr. Wilson's family lived about a mile from the village; his daughter came to the school-house to practice for the exhibition; I escorted her home. Charles Ramspeck, Emma Chivers and Miss Maggie Morgan, were all along, and when we came back Emma and Charles went that way home. I never suspected anything wrong about it; that was the fact.

In regard to seduction at the house, I know nothing about it; I will take my oath on it at any time; I know nothing about it. With the exception of going to assist her in her Latin, I know of no time of going to the house, except going early in the evening, in the way of a visit, and that very seldom. I did go to Atlanta about that time, and previously several times, and came back at night. I can explain it. It was in term time; I was teaching school; books had to be bought for scholars coming in; we had a regular set of books; I was accustomed to go and buy those books from Phillips & Crew, and bring them home, when the package was not too large, and having them sent by the train when it was too large, and myself coming home at night because there was no train, sometimes walking, so as to be home at school in the morning. My family was always informed of my business, and when I should come back, frequently at about nine or ten o'clock at night. Mr. Candler is acquainted with it, and knows it. That is all I know about going to Atlanta and coming back at night.

In regard to my telling Emma that I made seduction an object of prayer, I will die with the assertion on my lips that I never told her so. I never told her that I loved her better than my wife. I always told her that I loved my wife better than any one in the world. I know she has heard me say that, as I have said it in presence of others. When my wife was sick in 1869—one of our respectable doctors, Doctor Durham, heard what I say—there was some danger to her life unless there should be relief (by medical means) of the child, or she should have abortion. I said to the doctor, with tears in my eyes, the child is nothing, a thousand children are nothing—*save my wife*. That was in 1869, six or eight

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months after the time when this witness said I told her my wife would not live over two years!

In reference to the matter of congeniality, it may be that I told her our minds were congenial. I might have told her so; but as to congeniality of heart, or love, I never breathed such a thing to her. I never tried to wrong or injure her or her mother in any way. I might perhaps be asked why she should say all these things. I frequently say I don't know. I have thought of a good many things. My idea is that her mother formed an intense hatred to me from things that took place at our house, and that Emma and her mother are capable of anything. And, God knows, I do not say it in a spirit of uncharitableness, but simply in self-defense and in answer to these statements presented by these witnesses. I say now—whatever will be the result and issue of this whole matter—if the life of that child is spared, it will be my vindication. I know it is not my child. I said to her mother when I first heard of it, in the excitement of sudden passion, I told her she lied when she said it. I know it is not my child. As soon as I heard it, I went to Mrs. Chivers and she would not let me see her daughter. She said Emma was too sick. I told her what my friends had told me that Emma had said, that I had sent for her and had ruined her, and other stories. I had heard there were two or three stories. Mrs. Chivers' reply was, "none but some ladies know these things, and they took a solemn oath not to mention it." I said to Mrs. Chivers, "you know that stone (pointing to a large one,) can be the father of her child as soon as I can." She said she never thought anything of the kind, but that Emma was not in her right mind; when she was in her right mind, she would let me know, and I could have a conversation with her. She said in the meantime her daughter could not be spoken to by me or any one on the subject.

In regard to what witnesses said about my absence—I allude to the witness, Mr. Andrew Collier: On the 16th of January, my wife received a letter from a certain J. D. Gardner, of Troy, Alabama, formerly of the firm of Gardner,

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Worthy & Worthy. The letter ran in this way: "Dear Madam—I recently had a conversation with a citizen here, in this county, Mr. Collier, who told me things in regard to the trial of your husband, M. D. Wood, which I think would be invaluable to you in procuring a pardon for your husband from Governor Smith. Mr. Collier speaks from his own knowledge and his affidavit would be positive "

These were the words in the letter. Judge Hillyer read the letter, and has it. Mr. Lester and you (Mr. Candler) were not here. I gave the letter to Judge Hillyer. When it was received, I, my wife and Judge Hillyer read it. We were the only persons that knew of it. I wrote to this Mr. Gardner and, after some time, Judge Hillyer wrote a letter in reply to him. Mr. Andrew Collier wrote, under cover of a letter to his brother, a reply to Judge Hillyer's letter; that letter was shown to me, in which he stated what he knew. I then told Mr. Henry Hillyer to go and see about it, as the witness was out of the State, and his interrogatories in such a case would be of no avail. His reply to me was, "you had better go," and after conversing on the subject, I agreed to go and try to persuade the young man to come to this State and give his testimony, that we knew was in the letter. I got to Troy on Friday night; he lived nineteen miles from Troy. I hired a buggy and set out in the storm and snow; it sleeted and blew a hurricane, blowing down trees on the route. I went to Mr. Collier's and came back by five o'clock next morning. I saw him not more than one and a half hours, and conversed in presence of the man who had driven me in the buggy. I asked what he knew, and if he would come and testify. He consented. I went back that night, in order to get back to the train and be home on Saturday, so as to be in time for Court here on Monday. That is all I know about that.

I have only one word to say more, it is this: It is a satisfaction to me to know there is not a single member of my family believes I am guilty. (Judge Hillyer: "About the scene at Mrs. Morgan's?") That I have already spoken of.

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She may have been at Mrs. Morgan's that night, I don't remember. I walked with her from that neighborhood; there was no agreement or understanding to meet there. (Any plan?) No, sir. (Judge Hillyer: "Was Mr. Ballinger there, and did you suggest to escort Emma home?") No, sir, nothing of the kind.

There is no member of my family believes me guilty. My wife said, when this matter came out, "Of all the women in this State, Emma I. Chivers is the last I should have thought would have attracted you, Mr. Wood." She had no jealous feelings towards or in regard to Emma Chivers at all; and if she could testify, could prove an *alibi*. She would take her oath that, from circumstances which may occur in any family, when I slept in the study I always had the door open; it was never shut; it was absolutely impossible for any one to come in there without my wife knowing it. She would testify in reference to the room above; there is but a floor; she can hear the moving of a chair, or any conversation. As the door from that room opens on the back piazza, from there on to the piazza and into her room was my usual way. She never went to sleep till I came down. We frequently conversed between the two rooms. She would say, "You must come down now, for I want to go to sleep." I would shut the door and go down. And when this girl says I was with her, my wife knows I was with her. I say I never had carnal knowledge of Emma I. Chivers in my life. (Judge Hillyer: "The prisoner consents to be cross-examined.")

No cross-examination.

STATE, IN REPLY.

CHARLES M. RAMSPECK, re-introduced: (State whether, at any time, you ever came out of Mrs. Chivers' house at daylight?) That is positively false; I never did. (Is it true that you were in the habit of frequently leaving there between midnight and daylight?) Not to my knowledge, I never left at that time; I have staid there till probably twelve o'clock; I never knew of any young men leaving her house between

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midnight and daylight; I never walked down the railroad, hugging Miss Emma Chivers, or her hugging me.

HARRIET H. CHIVERS, re-introduced: (Who made Emma's dresses in 1867?) I have always made them; her dresses buttoned behind in 1867; she had one calico dress in 1867; the first time was after we moved to Mr. Wood's house, when her dress buttoned in front; I think that was in the summer of 1868; I lived in the house with Mr. Wood from August or July, and lived there till next October. (Did you quarrel with him?) No, sir, no quarrel; there was something; he had, at one time, a quarrel with Emma; what was said, I did not hear; I was in the kitchen; that is the only time that I remember; that was in regard to a carpet that was put down on the floor; Mr. Wood never told me to take Emma off the place.

Closed for State.

DEFENSE IN REBUTTAL.

W. D. KIRKPATRICK, re-introduced: (Do you know what kind of a dress Emma I. Chivers wore at school in 1866 and 1867?) I think she wore a dress open in front—most of the large girls did; she was considered one of the large girls; I think I know, of my own knowledge, that it opened in front.

Cross-examined: I never had my hand in it; I never kissed or hugged her; I knew most of the larger girls; I did not notice her dress more than others; I looked at that part of their dresses; I frequently look at a woman's breast; I am certain of it that hers opened in front.

The Court charged the jury as follows:

"GENTLEMEN OF THE JURY: The defendant is charged with the seduction of Emma I. Chivers. He begins the trial with the presumption of innocence in his favor. The law presumes that every man is innocent until the contrary is shown. The State makes the charge, and the proof in the case must support it. It must appear beyond a reasonable

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doubt that the defendant is guilty. The extent to which your minds must be convinced is a matter to which your attention will naturally be directed. Absolute certainty cannot be attained by the testimony of witnesses in Court; it is possible that any, that all human testimony may be wrong or untrue. The possibility of error is inherent in the very nature of it. Hence it is, that a fact is not required to be established to an absolute certainty. A reasonable and moral certainty is what the law requires. To authorize a verdict of guilty, you must have a certain degree of mental assurance or conviction. The inquiry is, whether the guilt of the defendant is established to a moral and reasonable certainty? Before you act in matters of the highest concern to yourselves, your minds are convinced to a certain degree of the propriety of your action. That is the degree of mental conviction that is required in this case. You, carefully and impartially, examine the testimony for the sole purpose of ascertaining the truth. After such an examination of the testimony, is the mind unsettled, wavering, unsatisfied? If it is, that is the reasonable doubt of the law, and produces an acquittal. This doubt must be a reasonable one, such as rests upon the mind of an impartial juror who is searching for the truth. It must grow out of the testimony, or spring from the want of testimony. You cannot imagine that this or that may or may not be so, create a doubt and then act upon it. It must be a reasonable doubt, honestly and fairly entertained by an honest and fair-minded man who seeks only the truth. If such a doubt exists, you should acquit; if it does not exist, it would be your duty to convict.

“The defendant is allowed to make such statement, not under oath, as he may deem proper in his defense. It is to have such weight as you may deem proper to give it.

“It is alleged in the indictment, that the defendant by persuasion and promises of marriage, and by certain false and fraudulent means therein set forth, did seduce Emma I. Chivers, a virtuous unmarried female and induce her to yield to

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his lustful embraces, and allow him to have carnal knowledge of her.

“It must appear from the testimony, that she was, at the date of the alleged seduction, a virtuous unmarried female. The test is to be applied to her at that date, and not at a subsequent period. The presumption of the law is, that she was virtuous, and that presumption remains until removed by the proof. She must have had personal chastity. If she, at that time, had never had unlawful sexual intercourse with man; if no man had then carnally known her, she was a virtuous female within the meaning of this law. If man had then carnally known her, had had unlawful sexual intercourse with her, she was not a virtuous female within the meaning of this law.

“If it appears that she was a virtuous unmarried female, it must further appear that the defendant seduced her; that he led her aside from the path of virtue; that he induced her to part with her virtue, and to allow him to have carnal knowledge of her, by the persuasion and promise of marriage, or by the other alleged false and fraudulent means that are set out in the indictment. Did he use the persuasion and make the promise to marry her, as is alleged in the indictment, for the purpose of deceiving her and of inducing her to allow him to have carnal knowledge of her, and did the persuasion and promise of marriage, when so used, mislead and deceive her, and induce her to yield to his lustful embraces and allow him to have carnal knowledge of her. If so, he would be guilty; if otherwise, he would not be.

“Did he use or employ any of the means set out in the indictment? If he did, were they or any of them, in the manner that he used them, false? Did he employ them for the purpose of deceiving her, and of inducing her to yield to his lustful embraces, and allow him to have carnal knowledge of her, and did they, or any of them, when so used, mislead and deceive her, and induce her to allow him to have carnal knowledge of her? If so, he would be guilty; otherwise, he would not be. It matters not whether the persuasion and promise

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of marriage, or the other false and fraudulent means were used at the precise time the carnal knowledge was had. In this respect, it matters not when they were used, if they induced her to yield to his lustful embraces and allow him to have the carnal knowledge. The carnal knowledge must have been the result of the use of the persuasion and promise of marriage, or the other false and fraudulent means. If the female was induced to yield to his lustful embraces, and allowed him to have carnal knowledge of her in consequence of her own lustful desire; if she was not misled or deceived, and induced to yield and allow it, in the manner stated, but did yield to him and allow the intercourse for some other reason, or from some other cause, he would not be guilty of seduction.

“The object of the testimony is to enlighten your minds in reference to the issue formed. You are the judges of the testimony—you pass upon its credibility. As a rule, every witness is to be believed until impeached according to some of the modes known to the law. You will take each witness, just as he or she may be presented to you by the case, and determine what degree of credit his or her testimony is entitled to here. In judging of the credibility of the witnesses, you will look to the manner of the witness in testifying—the inherent probability or improbability of the testimony given. A witness may be impeached by proof of contradictory statements. When that is done, it is a question for the jury to determine, in view of all the testimony, how far the witness is to be believed. If a witness, from inadvertence, or accident, or failure of memory, makes a false statement, the jury are to determine how far such statement affects his or her credit, and to what extent he or she is to be believed. If a witness, willfully, knowingly and corruptly, swears falsely—that is, of wicked purpose, knowingly swears falsely, intending to do so, such witness is not to be believed, and the matters stated by such witness are not to be taken as true, unless they are established by other testimony. The relation that the witnesses bear to the case, their feeling, and all the testi-

mony in the case, are to be looked to in passing upon their credibility. The testimony is to be reconciled, if it can be done, but if it is irreconcilable, then you must determine whom you will believe. These rules apply to all the witnesses, to those of the State and to those of the defendant; to those who are introduced to prove contradictory statements, as well as to those who are said to have made the statements.

“A juror can look only to the law and the testimony for his verdict. He cannot appeal to, or consult, his own private knowledge of either, or of both of the parties, or of any fact. He can consider no evidence or fact but that which he hears from the witnesses in open Court; upon that his verdict must be based. Look to the testimony! Accept these parties and the witnesses as they are made to appear by the testimony. Try—test them all by that, keeping constantly in view the great controlling object of your inquiry, which is an earnest, honest, impartial effort to learn the truth. It matters not to you what may be the consequences of your verdict—for the consequences, you are not responsible. It is your duty to make a *true* verdict, and there your duty and your responsibility end. The trial has been a long one, and you have been greatly taxed. All of you have served at personal inconvenience, and some of you have served under the most trying circumstances. But a public necessity existed, and you have cheerfully made the sacrifice. Preserve your patience and impartiality unto the end. Nerve yourselves for a faithful discharge of your duty. Dispassionately consider the case, and as you may find, so write your verdict.”

The jury returned a verdict of guilty; whereupon the defendant moved in arrest of judgment on the ground “that the indictment did not contain any sufficient allegation of crime against the defendant, to authorize judgment or sentence against him thereon.” The motion was overruled, and the defendant excepted.

The defendant moved for a new trial upon the following grounds:

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1st. Because the Court erred in sustaining the demurrer to the special plea in bar of said indictment.

2d. Because the Court erred in admitting evidence over the objection of defendant's counsel, going to show that the defendant had used means to keep young men from visiting and associating with Emma I. Chivers, and to induce her to avoid the company and association of young men; and that her mother agreed to the employment of such means, and to place the said Emma I. Chivers and her education entirely under the defendant's charge and control; and that the defendant told the said Emma I. Chivers that she was his favorite pupil and he wished her to trust him wholly, and that as she had no one to depend on, he wanted to keep her from annoyance; and that he had a particular secret to tell her, but could not do so unless they became more intimate than they then were; and that the defendant and the said Emma I. kept up a correspondence by letters; and that the defendant gave her a ring as a pledge of his promise to marry; and that he brought about her removal to his own house, and continued intercourse and sexual connection with her for more than two years after the loss of her virtue; and that she gave birth to a child of which the defendant was the father; and that she yielded to the defendant because he was her pastor, and was her superior, and because she thought he knew better than she what was right and what was wrong, and that she thought he was so noble and pure, and that she had perfect confidence in him, and she thought everything he said was right.

3d. Because the Court erred in admitting evidence over the objection of counsel for defendant, tending to show means used and persuasions employed by defendant to seduce the said Emma I. Chivers, which were not specified in the indictment, and which also went to show means used after the alleged seduction.

4th. Because the Court erred in the following charge to the jury: "The presumption of law is, that she (Emma I. Chivers, the female alleged to have been seduced) was virtuous, and that presumption remains until removed by the proof.

She must have had personal chastity. If she, at the time of the alleged seduction, had never had unlawful sexual intercourse with man, if no man had then carnally known her, had had sexual intercourse with her, she was a virtuous female within the meaning of this law."

"Did he (the defendant) use the persuasion and make the promise to marry her (Emma I. Chivers) as is alleged in the indictment, for the purpose of deceiving her, and of inducing her to allow him to have carnal knowledge of her, and did the persuasion and promise of marriage, when so used, mislead and deceive her, and induce her to yield to his lustful embraces, and allow him to have carnal knowledge of her? If so, he would be guilty; if otherwise, he would not be."

"Did he employ or use any of the means set out in the indictment? If he did, were they, or any of them, in the manner that he used them, false? Did he employ them for the purpose of deceiving her, and of inducing her to yield to his lustful embraces, and to allow him to have carnal knowledge of her, and did they, or any of them, when so used, mislead and deceive her and induce her to allow him to have carnal knowledge of her? If so, he would be guilty, otherwise, he would not be."

5th. Because the Court erred in refusing to charge the jury the eleven following written requests:

1. "A man may have unlawful carnal knowledge of a woman, and not be guilty of the crime of seduction. There is a wide distinction between the crime of adultery and fornication, and the crime of seduction. Under the laws of this State, the offense of seduction can only be committed by persuasion and promises of marriage, or by some false and fraudulent means other than persuasion and promises of marriage."

2. "Before you can convict the defendant of the charge in this bill of indictment, you must be satisfied from the evidence, beyond a reasonable doubt, that before and at the time of the alleged seduction, Emma I. Chivers was an unmarried female, and that she was virtuous, that is to say, that she was chaste, pure, unpolluted and uncorrupted, and that Myron D.

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Wood, finding her thus virtuous, did, by persuasion and promises of marriage, or by some other false and fraudulent means, seduce her, and induce her to yield to his lustful embraces, and allow him to have carnal knowledge of her."

3. "If you are satisfied from the evidence, that at the time of the alleged seduction, Myron D. Wood was a married man, living and cohabiting with a lawful wife, and that Emma I. Chivers knew that fact, and knew that Wood could not lawfully marry her, and could not make to her a valid or lawful promise of marriage, then you could not find him guilty of seducing Emma I. Chivers, by persuasion and promises of marriage, because a married man who is living and cohabiting with a lawful wife, and that fact is known to the woman who is alleged to have been seduced, cannot, in law, be guilty of seducing her by persuasion and promises of marriage."

4. "Before you can find the defendant guilty of seducing Emma I. Chivers, by false and fraudulent means, the evidence must satisfy you, beyond a reasonable doubt, that he told her some falsehood, something that was not true, and the evidence must further satisfy your minds that what he said was not only false, but fraudulent, and that she was deceived by it, and that she was induced by it to allow the defendant to have carnal knowledge of her; because, if what Wood said was false, and Emma I. Chivers knew it was false, and was not deceived by it, and did not act upon it, he would not be guilty of seduction, under the laws of this State."

5. "If you believe from the evidence that Wood told Miss Chivers that he would marry her when his wife should die, and that his wife could not live long, and was in bad health, such a promise is contrary to public policy and social morality, and would not support an indictment for seduction, and is not one of the false and fraudulent means, of which the law speaks, in defining the crime of seduction."

6. "If you believe from the evidence that Wood told Miss Chivers that it was not wrong for her to yield herself to him, when she knew that it was wrong, and that it was contrary to the Bible, and contrary to morality and virtue, then she was

not deceived or defrauded by that assertion. And if you believe that Wood told her that he would not harm her, when she knew that what he was endeavoring to do would ruin her morally and socially, then she was not deceived or defrauded by that assertion. And if you believe that Wood told her that his passion for her was pure and holy, when she knew it was lustful, and that he was seeking to gratify it by sexual intercourse, then she was not deceived or defrauded by that assertion."

7. "Testimony to warrant a conviction in a criminal case, should come from the lips of a credible and truthful witness, and hence the law declares that if a witness swear willfully false upon any one material point, the jury are at liberty to disregard her testimony altogether, unless corroborated by circumstances, or by unimpeachable evidence."

8. "Where the only witness to a transaction testifies falsely to a leading fact, respecting which there could be no mistake or misapprehension, her credit will not be restored so as authorize a conviction upon her testimony alone, although she may be corroborated as to immaterial matters by other witnesses or circumstances."

9. "If a witness swears willfully and knowingly false, even to a collateral fact, her testimony ought to be rejected entirely, unless it be so corroborated by circumstances, or other unimpeachable evidence, as to be irresistible."

10. "One reason for disbelieving a witness is the improbability or impossibility of her story; another reason for discrediting her is the fact that in her own testimony, she discloses acts done by her, and habits of life pursued by her, which exhibit moral turpitude in herself."

11. "The credit of a female witness may be impeached by proof that she is a common prostitute."

6th. Because the verdict of the jury is contrary to the law and the evidence.

The motion for a new trial was overruled, and the defendant excepted upon each of the aforesaid grounds.

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HILL & CANDLER; GEORGE N. LESTER, for plaintiff in error.

1st. The presiding Judge erred in overruling the special plea in bar of the indictment, because, in this State, a man who is known to the female alleged to be seduced, to be a married man, living and cohabiting with a lawful wife, cannot be guilty of the crime of seduction: See Code of Georgia, section 4305, which is the same section that defines the crime, and provides that "the prosecution may be stopped at any time by the marriage of the parties, or a *bona fide* and continuing offer to marry on the part of the seducer:" See, also, Mann *vs.* The State, 34 Georgia Reports, 1; The People *vs.* Alger, 1 Parker's Criminal Reports, 333.

2d. The presiding Judge erred in overruling the motion in arrest of judgment as alleged.

3d. The presiding Judge erred in admitting the evidence specified in the second, third and fourth grounds of the motion for a new trial made by the defendant in this case, because said testimony was illegal, irrelevant, outside of the case made in the indictment, and established a state of facts of which the defendant was not put upon notice, and which he, therefore, could not and did not come prepared to meet on the trial; and because the admission of said testimony violated the old and familiar principle of law, that the allegations and proof must agree. This testimony being illegal, its admission is good ground for a new trial: See Code of Georgia, section, 3663.

4th. The presiding Judge erred in charging the jury, "that the presumption of law was, that the female alleged to have been seduced was virtuous, and that that presumption remained until removed by the proof:" See 1 Bishop on Criminal Procedure, section 1061; West *vs.* The State, 1 Wisconsin Reports, 209.

5th. The presiding Judge erred in charging the jury, "that if, at the time of the alleged seduction, the female alleged to have been seduced had never had unlawful sexual intercourse

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with man, and if no man had then carnally known her, she was a virtuous female within the meaning of the law :” See Zell’s Encyclopedia, which defines the word “virtuous” to be, “chaste, pure, unpolluted, as a virtuous woman;” Webster’s Dictionary, which defines the word “virtuous” to be, “chaste, pure;” Andre *vs.* The State, 5 Iowa Reports, 389; Bock *vs.* The State, 5 Iowa Reports, 430; The People *vs.* McArdee, 5 Parker’s Criminal Reports, 180; Kenzon *vs.* The People, 26 New York Reports, 203; 2 Bishop’s Criminal Law, section 1019.

6th. The presiding Judge erred in charging the jury, “that if the defendant used the persuasion and made the promise to marry, as alleged in the indictment, for the purpose of deceiving the female alleged to have been seduced, and of inducing her to allow him to have carnal knowledge of her, and the persuasion and promise of marriage, when so used did mislead and deceive her, and induce her to yield to his lustful embraces and allow him to have carnal knowledge of her, the defendant was guilty.”

7th. The presiding Judge erred in charging the jury, “that if the defendant used or employed any of the means set out in the indictment, and any of them, in the manner that he used them, were false, and he employed them for the purpose of deceiving Miss Chivers, and of inducing her to yield to his lustful embraces, and to allow him to have carnal knowledge of her, and such means, when so used, had that effect, the defendant was guilty.” An analysis of the indictment will demonstrate the impropriety of this charge. If erroneous and hurtful to the defendant, a new trial ought to be granted: See Code of Georgia, section 3664.

8th. The presiding Judge erred in refusing to charge the jury as requested, which requests are all copied in the bill of exceptions. If the charges requested were pertinent and legal, the refusal to give them is a good ground for a new trial: See Code of Georgia, section 3664. The first request ought to have been given, because it embodies both truth and law, and was directly pertinent to the issue of the case. So of the

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second, third, fourth, fifth and sixth requests. The defendant rested his defense upon the idea, first, that he never had any sexual intercourse with Miss Chivers at all, and, second, that if the jury should think otherwise, such intercourse, under the proof, did not amount to seduction, but was adultery and fornication only. Hence, it was the defendant's right to have the law as to seduction, and as to adultery and fornication, and the difference between the two clearly defined, so that the jury might judge from the evidence as applied to the law, of which crime, if either, he was guilty: See 12 Georgia Reports, 142, head-note 6; 15 *Ibid.*, 189, head-notes 2, 3, 4; 17 *Ibid.*, 444; 17 *Ibid.*, 497, head-note 13; 21 *Ibid.*, 310; 24 *Ibid.*, 505, head-note 6; 29 *Ibid.*, 594, head-note 1; 30 *Ibid.*, 133; 32 *Ibid.*, 515; 38 *Ibid.*, 252; 44 *Ibid.*, 128, head-note 2; *Ibid.*, 173, head-note 5.

The seventh request should have been given, because the proof justified it; it contained sound law, and was pertinent to the issues of the case: See 13 Georgia Reports, 508, head-note 4.

The eighth request should have been given: See 23 Georgia Reports, 297.

The ninth request should have been given: See 23 Georgia Reports, 576, head-note 3.

The tenth and eleventh requests should have been given: See 29 Georgia Reports, 266, head-note 1; 30 *Ibid.*, 888, head-note 2.

JOHN T. GLENN, Solicitor General; PEEPLES & HOWELL;
GEORGE T. FRY, for the State.

McCAY, Judge.

By the laws of this State, seduction is treated as a most heinous crime, and is punished with the very longest period of penal servitude known to the Code, except that of perpetual imprisonment. If the crime be in fact committed, this is a most just and salutary law, since it is hardly possible to conceive of a more base and dastardly deed. It is a grievous

wrong, done by a selfish, heartless villain, against a helpless and innocent victim, and it is most justly denounced by all good people as a fiendish offense against God and against society. The man who is guilty of it has betrayed and ruined a *woman*; has, by artful and fraudulent practices, seduced her from the paths of virtue, inspired her with lustful desires, and, finally, led her, perhaps, at last, a willing victim to crime. It is this deliberate, fraudulent, artful leading into crime of a trusting, pure-minded girl from chaste thoughts and pure desires, that gives such *moral turpitude* to the offense. Of the actual fornication both are guilty—guilty even under human laws—and both are subject to the same penalty. It is the *seduction* of the woman by the man that forms the gist of, gives the name to, and makes the heinousness of this offense. Neither the language nor the spirit of the statute makes the crime to consist solely of procuring, by fraudulent means or otherwise, a woman hitherto undebauched to allow of illegal sexual intercourse with her. The means used must be fraudulent and deceitful, and must “*seduce a virtuous* unmarried female—induce her to submit to the lustful embraces of the seducer, and allow him to have sexual intercourse with her.” All the language, and all the sentences and clauses have a meaning. The woman must be *seduced*—led away from virtue—induced to permit lustful embraces, and, finally, to commit the crime of fornication. And this is the invariable history of cases of seduction. The seducer first gets the confidence of his victim by a promise of marriage, or by some other fraudulent means; he next seduces her away from modest and pure and chaste thoughts; then follows lustful toyings and lascivious embraces, until the poor girl, her confidence betrayed, her chaste thoughts turned into lustful desires, *allows and consents* to crime. The woman who, in *consideration* of a promise of marriage, consents to fornication with the promisor, is not seduced. She sells herself just as completely as if she had given the same consent in consideration of a promise of money. The whole purport of the statute, its fundamental, essential idea, is, that the seducer has, by his arts, first defiled the heart, and made

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lust and desire to dwell where he found chastity and purity, and having *thus* disarmed his victim, procured an easy surrender. He must "seduce a virtuous unmarried female, *and* induce her to submit to his lustful embraces and allow him to have sexual intercourse with her."

An indictment would not be a good one under this law, if it simply charged that the defendant had, by persuasion and promise of marriage, procured a virtuous unmarried woman to allow him to have illegal sexual intercourse with her. The words and the sense of the statute require it to be stated that the woman has been "seduced and induced to submit to the lustful embraces of the seducer, and allow him to have carnal connection with her." Each of these phrases is something more than mere tautology and useless verbiage, and is to be treated as having a meaning, and they are all significant of the legislative will.

I have been thus particular in expressing my understanding of what it is that makes the crime of seduction, because it almost necessarily follows that if this be the meaning of the statute, the defendant is entitled to a new trial.

The indictment upon which the trial was had contains three counts. 1st. One charging the seduction by persuasion and promises of marriage. 2d. One charging the seduction by false and fraudulent means. 3d. One charging it by persuasion and promises of marriage, and by false and fraudulent means. The second and third counts, whilst they charge the seduction by false and fraudulent means both set forth, as a part of the false and fraudulent means, the persuasion and promise of marriage, relied on and set forth in the first count. The promise of marriage set forth is to this effect: That he (the defendant) would marry the said Emma I. Chivers, *so soon as his wife should die*, he at the same time, saying that his wife was in bad health and would die in less than two years. To the whole indictment, as well as to each count of it, the defendant pleaded a special plea in bar, as well as not guilty. This special plea was to the effect that at the time the said crime was charged to have been committed, as well as for

several years previous thereto, the defendant was a married man, living daily with his wife and children, and that this was well known to Miss Chivers, who was a sensible and well educated woman.

To this plea there was a demurrer, and the demurrer was sustained by the Court and the plea stricken.

So far as this was a plea in bar to the whole indictment, we think the Court was right. The issue presented by the plea assumed the law to be that a married man, known by the woman seduced to be such, cannot, under *any circumstances*, whether by promise of marriage or otherwise, be guilty of the crime of seduction.

We are not prepared to admit this to be the law. The words of this section of the Code are: "Any person, who, by persuasion and promise of marriage, or by other false and fraudulent means, shall seduce a virtuous unmarried female," etc. There is also a provision that the defendant may condone the offense by marrying the woman seduced, or by a *bona fide*, continuing offer to marry.

It is contended that as the female seduced must be unmarried, and as there is a provision for condonation by marriage or by an offer of marriage, it was intended that a married man could not be guilty of the offense. But we can see various reasons why this is not a fair construction of the law. A married woman is better skilled against the arts of the seducer than the ingenuous, simple-minded girl, and she cannot so surely be treated as the victim of a villain. Besides, the words of the law are not any unmarried man, but "any person," and we think it is straining that portion of the section which permits the condonation beyond its meaning to give it the effect contended for. It is rather an aggravation of the wrong that even the reparation permitted is impossible. The act has two clauses. "If any person, by persuasion and promise of marriage, or by other false and fraudulent means, shall seduce," etc.

That a married man may be guilty of seducing, by false and fraudulent means, a woman who knows he is married, is,

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we think, incontestible. He may win her confidence in many ways. He may be her guardian, her near kinsman. He may, as is charged in this case, be her teacher and spiritual adviser; she may honestly and chastely honor, confide in and trust him. She may look to him as the fountain of truth and purity, so that his acts, his words and his opinions shall be to her as those of a God. Under such a state of circumstances, the girl is as much a victim as though her confidence were the product of that tender and confiding relation existing between plighted lovers, bound by pledges to be consummated at the altar of marriage. Indeed, as all experience has proven, the influence which a priest may acquire over a devotee is, perhaps, of all others, the most complete, and whilst she may by it be led to a purer life and to a holier condition, it is possible that she may be led by it blindfold into sins of the deepest die. We do not think, therefore, that this plea was a good plea in bar to the whole indictment. But whilst we so rule, we are, at the same time, of opinion that the plea was a good plea in bar to the first count of the indictment—the count charging the seduction on the persuasion and promise of marriage alone. According to our understanding of this statute, it requires that the woman should be *betrayed by some sort of false and fraudulent means*. The statute says by persuasion and promise of marriage, *or other* false and fraudulent means. In this is implied that the promise must also be a fraud, one calculated to deceive, one that may win the confidence and allay the suspicions of an artless, unsuspecting maiden. Can a promise of marriage made by a man having already a wife, with whom he is at the time living, and this well known to the woman receiving the pledge, have such an effect? Can a woman of ordinary sense, who has allowed such a promise to win her confidence, claim to have been seduced by arts and persuasions into the sin of fornication? Can she be said to be a victim if she has trusted to the vows of a married man that he would marry her, *knowing* as she does that he cannot and will not marry her? We think not. The woman who listens to such a promise is either a fool or she is a bad woman already. The

confidence of no good woman could be acquired by any such a promise. It could not be made the means of seduction. It is upon its very face a warning to beware. It is a promise so improper in itself, so contrary to all notions of delicacy, true virtue and good morals, that any girl of even ordinary chastity must instead of confiding in, be shocked by it. No reasonable human being could *confide* in such a promise or be *betrayed* by it into confidence in the man who made it. The girl who listens to such a promise is not betrayed, and if under such an excuse as that she toys and is finally a criminal, she is not seduced, but has run, of her own lusts, into sin.

By the way in which this indictment is drawn, whilst this promise of marriage is made a leading ingredient in each count, yet as only the first count is based on persuasion and promise of marriage alone, the plea though a good plea in bar to that does not meet all the false and fraudulent means charged in the other two counts. We think, therefore, that even if the plea were fully sustained by proof on the trial; there was still matter set forth, which if true, would authorize a judgment.

It is complained that the Judge erred in charging the jury that if the defendant seduced Miss Chivers by any of the means charged, he was guilty. As the promise of marriage is set forth in each count, and is alleged to be one of the fraudulent means by which the seduction was effected, it follows from what I have said that this charge was error. To make a fraud, there must be confidence and a betrayal of it. A pretence, that is upon its face a sham, that can deceive nobody, that no modest woman would listen to for a moment, cannot beget confidence, and cannot be the means of betrayal.

Again, it is charged as error that the Court told the jury that if the girl had never before had carnal sexual intercourse with a man, she was a virtuous woman in the sense of the statute, and that the law presumed her to be such until it was otherwise proven. I am disposed to agree with the Judge as to the presumption of law. It is true the law presumes the prisoner innocent until he is proven guilty; but it does not follow that, in making out this proof, the State can use no

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presumptions. The law will presume, for instance, that the prisoner is a sane man; it will presume malice from certain acts; it will presume that the sun rose and set, as it has always done; it will presume that witnesses tell the truth, unless something appears to the contrary. Indeed, as is well settled one may be found guilty of even murder on proof of facts from which his guilt is presumed. The natural, normal condition of an unmarried female is virtuous. If she be less than this, it is a fault, and it ought not to be presumed in any investigation. But I do not agree with his Honor in his charge as to what constitutes a virtuous woman in the sense of this section of the Code. The whole of the section is to be taken together, and the word virtuous is to have such a meaning as does not make other parts of the section meaningless. Under the definition the Judge gave to the jury of this word, it means simply a woman who has never before been guilty of fornication or adultery. She may be a bad woman at heart; she may be filled with all uncleanness; she may be burning with lust, and yet, if, through lack of opportunity, she be yet not an actual violator of the law, she is a virtuous woman in the sense of this law, and one may be guilty of the fiendish crime of seducing her, *inducing* her to submit to his lustful embraces, and to allow of criminal intercourse.

I do not think so. It needs no fraud or vile arts to make an actual criminal of such a woman. She cannot be *seduced* from virtuous, chaste thoughts to lustful desires and lascivious passions—she is there already; and the man who, by promise and persuasion, gets her to break the law, has only violated the last clause of this statute. The crime he commits is neither within the letter nor the spirit of this law. The woman is not a victim.

It is said no other distinct line can be drawn than that drawn by the Judge. And that is true. But where is the necessity of any fixed line at all? The persuasions, the arts and frauds of the defendant in *committing* the crime are not, and cannot be so reduced to exactness. Why should the character of the woman be determined only by a rigid rule? She is not

on trial. If it were a crime not to be virtuous, there would be propriety in fixing the terms of the crime, to use words that would show precisely how the guilt should be proven. But here the crime is the seduction of virtue, and I can see no propriety in any other line than that which *satisfies the mind of the jury*. It is said, too, that facts which under one set of circumstances show want of virtue—that is, of a chaste mind—might not do so in other circumstances. But this is true, even if the standard be as contended for. In this State the acts and practices described by Mr. Irving as common even between virtuous minded people among the Knickerbockers, or by Hogg and Scott, among the Scotch, would justify a jury in finding *actual* guilt *before the law*.

In my judgment the question of what is a virtuous woman ought to be left in each case to the jury, since so far as it is evidenced by circumstances, it must depend upon education and on the *state of society* in which the girl has been reared. To require the defendant, in order to defend himself from a criminal charge, to start with a presumption of the virtue of a girl, and prove her want of virtue in this sense by actual direct proof, is absurd. The woman herself cannot be compelled to answer, no man can be *made* to swear, since a witness cannot be required to confess a crime. Such things are invariably done in secret and the proof would be practically impossible. Nor is the reply to the position I have taken that this rule takes away the protection of the law from a girl who, playfully or in the mere spirit of fun or flirtation, and from habits of life or the customs of society, does acts which squeamish people deem improper. This utterly misconceives the position I have taken. I insist upon it that a woman is not a “virtuous woman” whose heart is lascivious, whose mind is corrupted and defiled by lustful desires and unchaste wishes, and that this *may* be proven by other facts than proof that will satisfy the mind of an act punishable by law. What that evidence may be or may not be, I would leave to the facts of each case. Do they satisfy the *jury* that the girl is impure, lustful, lascivious, that her heart has gone

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away from virtue, that however her body may yet be not actually defiled, yet that all true chastity has ceased within her, and that it needs no arts or seductions, but only opportunity, for her to be guilty of the act of crime? The definition given by the Judge makes a virtuous woman to be one of a certain *physical condition*.

Virtue is a thing of the heart and mind. A woman who has been guilty of fornication has done an act showing that she is not of a virtuous heart, or, at least, that she was not at the time of the act. The evidence, it is true, is very conclusive, but it does not at all follow that she is a virtuous woman because she has not broken the law, no more than it follows that a man is honest because he has not violated the law against stealing.

To be guilty of the crime of seduction is one thing, and to induce a woman to commit fornication is another. The crime of seduction involves purity of heart and a chaste mind in the woman seduced. She must be *led away* from virtue. The definition of the Judge would exclude a woman who, years before, had been guilty of fornication, but who had repented and was now perfectly virtuous; perhaps the more so that she once had sinned and repented in sackcloth and ashes. And this definition of a seducible woman is, as I believe, contrary to the general sense of the word, as used both in England and America.

In the United States, seduction is made a crime, in several of the States, to-wit: in Pennsylvania, Ohio, New York, Minnesota, Iowa, Oregon, and in other States. In all of these States the crime consists in seducing a "hitherto chaste female," or "of previous chaste character," or "of good repute for chastity," and in none of them, so far as I can find, has it ever been held that actual criminal sexual intercourse is the only test of unchastity. It is hardly to be supposed that it was the intention of our Legislature to lower the legal standard to be applied to the victim of the seducer. We all speak the English language. The poetry and the literature of our mother tongue, which fix the meaning of words, have painted the char-

acter of a seducer in terrible colors, and it is a fair presumption, especially in construing a criminal law against the prisoner, that *this* is the character, the betrayer of female innocence, that was intended to be punished. This is the character punished in other States; this is the natural, long understood meaning of the words, and this, in my judgment, is the only sense of the word which will make the different clauses of this statute all have a meaning, and rescue it from (what appears to have been its understanding in this trial,) the imputation of being an act to punish a man who *buys* a woman to consent to gratify his lust by a promise to marry her, a consideration which may or may not be better than a money consideration, according to the character of the man who pays the price. I think, too, that this Court, in the case of *Mann vs. The State*, 34 Georgia, 1, virtually decided this question. In that case, Mann had been convicted of violating this very law. This Court granted him a new trial, because he had, after the trial, discovered he could prove by a witness that before the seduction he had seen the woman, after night, come out of her father's house with a man with whom she was on familiar terms, go some fifty yards from the house and lay down, and that, from what he had known of the girl, it was his opinion that she was of *easy virtue*. Surely this would not prove the girl to be guilty of fornication, and the Court, in granting a new trial, could only have done so because the proof would show the woman not to be a modest, pure minded woman. The proof made in this case by Collier is such that, if true, this girl was not a good girl before Wood met her. The charge of the Court, in effect, withdrew this evidence from the jury as proof of a want of chastity, because it did not show actual crime.

In this, I think, there was error. If Collier told the truth this girl was not seduced. She was ripe for crime already, and only needed the chance to fall into it in fact. I do not intend by this to say that the jury were bound to believe Collier, but I think the Court erred in his charge by declaring to the jury, in effect, that the defendant might be guilty

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though Collier spoke the truth. No girl, in my judgment, who is so far given up to unchaste thoughts and lustful desires as Collier testifies to, can, in any fair sense of those words, be called a virtuous female. It is a perversion of terms that shocks all sense of propriety in the use of language. As the case went to the jury, this evidence of Collier, Kirkpatrick and others, was before them *only* to contradict Miss Chivers when she swore that no man except Wood had been guilty of such freedom with her person. It was only there as to her *credit*. In our judgment it was entitled, if true, to far more weight than this. It went to show that Wood was not guilty, that the whole story—of an innocent, pure-minded girl, wrapped up in holy reverence for her minister, and led by him, through her confidence in his sanctity, to believe a lie and go into sin, thinking it right—is all a sham. The girl who thus plays with a viper, who thus stands upon the brink of the river of vice and indicates her readiness to plunge into its polluted waters, is not the material of which saintly devotees are made. *She* has drank of the fountain of carnal desire. The eyes of such a woman are opened; her ideas of morality and holiness are not at the behest of a saintly hypocrite; she is too old, too much of earth and of the flesh, to be borne off to those serene heights where her saintly heart may be beguiled into thinking wrong, right, and lasciviousness, purity. One can conceive of simplicity and innocence thus wrapped up in a supposed apostle, but if Collier's story be true, this girl was not capable of losing herself in any such fanaticism.

We think there was error also in the refusal to charge, as requested by defendant's counsel, that "one reason for disbelieving a female witness is the fact that the witness discloses in her testimony acts done by her and habits of life pursued by her which exhibit moral turpitude."

This is the precise language of this Court, in the case of *McDaniel vs. Walker*, 29 Georgia, 180, and it is law if the facts of this case make it pertinent. One female witness here testified, that for eighteen months she had been in the practice of frequent illegal sexual commerce with the pastor of the

church to which she belonged; that she was in the frequent habit of going from the prayer meeting to their place of guilt; that she would of her own motion follow him to his home, wait until his family prayers were concluded, and then steal from her hiding place into his study, where, almost in sight of his wife and children, she would join with him in the violation of all the laws of God and man, and even of decency, and then go her way alone to her mother's house, she, too, all the while, a member of his church and communing with him and her fellow members. Such guilt, duplicity and hypocrisy is very great, and it was proper matter for the jury to call to mind in fixing the credit to be given to her statements.

It seems absurd to say that the prisoner is not to have the benefit of any doubt of the truthfulness of such a witness, because he was the author of and joined in it.

That is what is to be tried, and such a position assumes his guilt. The law presumes he is innocent until proven guilty, and this position that against him the woman is to be believed, because he is guilty, takes for granted the whole issue on trial.

Nor can it be said that this charge was improper as asked, because it points out too clearly the witness and amounts to a presumption of the fact. The Judge can only charge upon points involved in the evidence, and if the statement of the law is so pertinent to the facts before the jury as to make it fit with startling accuracy, that is no reason why the law should not be given.

It would be a very liberal construction indeed to say that this request was given under the general remarks of the Judge as to the credibility of witnesses. It is only by rather a strained inference that such a view can be sustained. All that can fairly be said is, that the charge as given is not inconsistent with this request. But our statute means more than this. It says that a new trial may be granted if the Judge refuse to give a pertinent legal written request in the language requested. Revised Code, section 3664.

It is ordinarily proper to give the charge in the language requested; surely that is contemplated by the statute. True,

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it sometimes happens that this is verbose, wanting in precision, and we would not make it necessarily *error* to refuse the exact language. But clearly, the party has a right to have his written request, if it be legal, pertinent and material, given *distinctly* and in substance. It ought not to be left to the mere inference of the jury, unless that inference be very plain and necessary.

We think there was error in refusing to draw the distinction between seduction and fornication and adultery, because, in our opinion, the jury *might*, under the indictment, and under the evidence, have found the defendant guilty of adultery and fornication. It is a settled rule that under a charge of a higher offense of the same nature, if the higher necessarily includes the lower, the jury may find the defendant guilty of the lower. As in murder, the jury may convict of manslaughter, assault and battery, or even of assault. Seduction is a felony. It necessarily includes the other. One cannot be guilty of seduction unless he be also, as part of the same act, guilty of adultery or fornication. On the principle that on an indictment for the felony, the jury may find defendant guilty of the mere misdemeanor, it would seem to follow that under an indictment for seduction the prisoner may, if the proof justify it, be found guilty of adultery or fornication, as the facts show which of the offenses it is. In New York this very question has been so decided, and the general rule, where the larger offense includes the lesser, is well settled by the decisions of our own Court.

Judgment reversed.

TRIPPE, Judge, concurring.

The plea in this case makes the issue whether a married man, whose marriage is known to the female alleged to be seduced, can commit the crime of seduction by persuasion and promises of marriage. The words of the law are: "If any person shall, by persuasion and promises of marriage, or by other false and fraudulent means, seduce a virtuous unmarried female, and induce her to yield to his lustful embraces, and

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allow him to have carnal knowledge of her, such person, on conviction, shall be punished," etc.

The first count in the indictment charges the seduction to have been accomplished by persuasion and promises of marriage. The second count charges "other false and fraudulent means." The third count charges both persuasion and promises of marriage, and other false and fraudulent means. The plea was filed to all the counts, and agreed by the State to apply to each and all. The State demurred to the plea, the demurrer was sustained, and the plea disallowed as to either or any of the counts. Thus the Court below held that a married man, whose marriage was known to the alleged victim, could commit the crime of seduction by persuasion and promise of marriage. That judgment is brought here for review.

What was the object of the statute? It was not to make adultery or fornication an offense and punishable. That had been done before. It was not to make fornication, when committed by persons between whom there existed an engagement to marry, more penal than it already was, simply because of that engagement. The statutes of some of the States do this, but in each such statute, or in the decisions construing them, it is provided or held that the man must be unmarried, or not known to the woman to be married. The great object of those statutes, and of ours, and of all such law givers, must have been to prevent the sacred promise of marriage—the promise to become *one*—the promise of taking the vow of love and fidelity and protection for life—from being made a means of destroying the character, the peace and happiness of one who accepts and confides in that promise. It was to protect the honor and purity of woman from an attack by a seducer, armed with all the power and influence that such a promise must give.

If a woman be in danger from a seducer, the power and chances of that seducer are greatly increased when she surrenders her heart, and the strong bond of promised marriage exists between them. Just there this wise and salutary law—salutary if not perverted—steps in and says to the lustful out-

law, "If you make the promise to enter into that relation which the law of God and man sanctions, approves and invites, and public policy demands—an instrument to debauch virtue and ruin her who has trusted to it—the brand of the felon shall be upon you." I repeat, such a law is wise, prudent and salutary. It punishes with severity a most odious crime, and protects virtue where its defenses are overreached by the false pretences or fraudulent artifices of the spy and the traitor. But to say that a promise of marriage, no matter by whom made, whether the man be married or not, whether the promise be impossible or not, shall or can be the means of seducing a "virtuous unmarried female," and shall be punishable, in case of such a seduction, with the same ignominious penalty, is to confound all gradations of punishment, and to vindicate the assumed wrongs of one who leaps to her ruin, as strongly as the wrongs of one who has been cheated, blinded and defrauded to her ruin by falsehood and fraud. No rule of the civil Code grades its penalties on such a basis.

A false and fraudulent promise of marriage, trusted in by the woman, has, doubtless, often been, and may be again, the means of seducing a "virtuous unmarried female;" and though, by her fall, she may draw the finger of scorn upon her, yet the law becomes her avenger and punishes her wrong-doer, because, by his falsehood, she is defrauded to her ruin. But for her, or any one, or the law, to ascribe her wrongs or ruin to a promise which *she knew* was both false and impossible of performance; to say she was seduced by listening to a promise as degrading to her by listening to it as to the one who made it; by a promise of a man of what she knew he did not have, is as utterly at variance with the true wisdom of all law and sound morals as it would be for her to claim the sympathy and vindictive protection of the law for yielding herself by a promise of a palace from a pauper, or of a crown from a beggar. As well might she say a bauble or a penny was her price, as that a known barren, worthless, promise won her.

Surely the law does not set up her virtue as of such great worth, that it must be vindicated by such high penalties. But

it may be said that if the law so declares, it matters not what may be thought of its wisdom or the consistency of its logic, it must be administered as it is written. This is true, but it is none the less the duty of a Court to construe and define the meaning of the law when a question for construction arises. The words of the law are: "Shall by persuasion and promises of marriage, or other false and fraudulent means seduce a virtuous unmarried female," etc. No one can deny that the "other means," other than promise of marriage, must be "false and fraudulent." Those are the very words of the law. "False" means that which is not true, coupled with a lying intent. "Fraudulent" is something that will deceive, cheat, mislead, inducing a belief in what is not true and action on such belief. Can it be fairly claimed that all the other means must be false and fraudulent, believed in by the victim, and she deceived by them, but it matters not whether the promise of marriage was false or fraudulent or believed in, or whether she was deceived by it or not? This would make mere words—words known to be nothing but an empty sound—*vox et præterea nihil*, constitute an essential in a most infamous crime. It would only be equaled by that construction of the old English statute making it treason to imagine the death of the King, where it was held, that the owner of an inn called "The Crown," on urging his son to do his duty, because he would be heir to the Crown, was guilty of treason in imagining the death of the King, for no one could inherit from the King until he was dead. The whole spirit of our law, the reason and the context seem to require the construction, that the promise of marriage must be made under circumstances that would not only make it false, but the victim of that promise must be deceived by it. This she could not be if she knew the promise could not be performed.

Again: It is said that the promise might be made by a man who was married and his marriage not known to the woman. What I have said meets this point and implies that by such a promise the crime of seduction could be committed under the law.

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It is further said that the promise might be conditionally made, to-wit: on the event of a divorce, or the expected death of the wife, and a virtuous female misled or deceived by such a promise. The indictment does charge this latter condition, that is, that the death of the wife was expected, or it was believed or stated by the defendant to Miss Chivers that his wife would not live longer than two years, and he would then marry her. I will not dismiss this as was done by a Judge in his reply to a similar point, by the single remark "that such a promise would be void as against public policy, I have no doubt whatever."

Doubtless such a promise would be void. But a higher ground may be taken in reply. Such a promise and such negotiations are not only void as against public policy, but the public policy that would allow no woman damages for a breach of a marriage promise so made, still less would vindicate her if she gave up her virtue by means of such a promise, and in such vindication impose a longer term of imprisonment upon the alleged wrong doer than for any other crime save one that is punishable by death or imprisonment for life. The man who would thus act might deserve such a fate, but I do not think that any law or law-giver would give as a reason for the punishment that he had seduced a virtuous unmarried female. The moral crime against the dying wife might call for any penalty, but hardly any law would punish the act as a wrong against her, who would by her own showing exhibit herself as unworthy of any defender. Least of all, could such a woman thus bartering her virtue, claim to be a "virtuous female" seduced by promise of marriage, and I do not think that such a promise or such a character comes within the scope of the provisions of the law. The man who thus acts, who comes within either class that I have been considering, may be vile and a criminal, he is vile and a criminal, and would be punished on conviction, but not for what he is not and cannot be in such cases, the seducer of a virtuous unmarried female by persuasion and promise of marriage.

But few laws of a similar kind to ours have been brought

under notice in the argument of this case. One statute, that of Wisconsin, excludes all idea, by its very terms, that a married man can seduce by or under a promise of marriage, or that a promise of marriage from a married man can have any agency in seduction. The statute is, "any unmarried man who, under promise of marriage, or any married man who shall seduce," etc. The law-makers there did not seem to think such a thing possible as seduction by a married man under a promise of marriage. In New York the statute says nothing of a married man, but provides a punishment for seduction "under promise of marriage." Under that act it was held in two cases that a married man, known to the woman to be married, cannot be guilty of seduction "under promise of marriage." The Court in pronouncing judgment say: "To call such an engagement a promise of marriage would be a flagrant perversion of all legal sense and learning." 1 Parker's Criminal Reports, 333.

I do not think the Court erred in charging that "the presumption of law is that the female alleged to have been seduced was virtuous, and that presumption remains until removed by proof. She must have personal chastity. If she, at the time of the alleged seduction, had never had unlawful sexual intercourse with man, if no man had then carnally known her, she was a virtuous female within the meaning of the law. If man had then carnally known her, had had sexual intercourse with her, she is not a virtuous female within the meaning of the law." The proof of lascivious indulgences and wanton dalliances, with other evidence short of direct proof of the overt act, may authorize a jury to infer actual guilt, the illicit act. In the eye of the law a woman is virtuous unless she is guilty of sexual intercourse. She may do wild and wanton things, but unless she be legally guilty, she is legally virtuous. If she does not violate the law, she does not forfeit the protection of the law. Any other standard in law would seem to set up too loose a rule for the guidance of juries, and what would be held by one jury as showing a want of virtue, would be considered by another as



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innocent. If a jury believe from the evidence that the illicit act has been committed, the want of virtue is then shown. This may be shown by circumstances as well as by direct proof.

I concur with my brother McCAY as to the right of the defendant to have had the request in relation to the credibility of a witness given in charge; and the more especially was it his right where his conviction may be had on the uncorroborated evidence of the woman alleged to have been seduced. The statutes on this point, in several of the States and of the United States, require the woman's testimony to be corroborated. I have found no statute that does not require this, except our own. Where a defendant is thus exposed, he is entitled specially to the right to have all legal and proper principles applicable to the case to be given in charge to the jury. I also concur on the other points in his opinion on which the judgment of this Court is given, and generally in his reasoning thereon, except as to the point wherein I have above expressed a different opinion, and I concur in the judgment reversing the judgment of the Court below, and granting a new trial.

WARNER, Chief Justice, dissenting.

The defendant was indicted for the seduction of Emma I. Chivers, an unmarried female, under the provisions of the 4305th section of the Code, which declares that, "if any person shall, by persuasion and promises of marriage, or other false and fraudulent means, seduce a virtuous unmarried female, and induce her to yield to his lustful embraces, and allow him to have carnal knowledge of her, such person, on conviction, shall be punished by imprisonment and labor in the penitentiary for a term not less than two nor longer than twenty years. The prosecution may be stopped at any time by the marriage of the parties, or a *bona fide* offer to marry on the part of the seducer."

When the defendant was arraigned, he filed a plea in bar of the indictment, alleging therein that he was a married man at the time the offense is alleged to have been committed, and had been so for more than eleven years; had a lawful wife,

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with whom he was then cohabiting, and three children, which was well known to the said Emma I. Chivers, and could not have been a party to a contract of marriage, etc.

The counsel for the State demurred to the plea, which was sustained by the Court, and the defendant excepted. The question made by the defendant's plea is, whether a married man, known to be so by the female alleged to have been seduced, can be indicted and convicted under the before recited section of the Code. This section of the Code, it will be perceived, is not restricted, by its terms, to unmarried men, but declares that if *any person* shall, by persuasion and promises of marriage, or other false and fraudulent means, seduce a virtuous unmarried female, etc. The fact that the seducer cannot repair the injury done by marriage, because he is already married, does not lessen the offense, but is an *aggravation* of it. It might as well be said that if an unmarried man should seduce a virtuous unmarried female, by persuasion and promise of marriage, and should afterwards marry another woman, that he could not be convicted and punished because he could not then repair the injury by marriage of the victim of his lust. This section of the Code should receive a reasonable construction, that the injury done to the seduced female may be repaired by the seducer by marriage, when it can *lawfully* be done. But it is said the seduced female in this case knew at the time that the defendant could not marry her, and, therefore, she was not deceived by him, that she acted in her own wrong. The reply is, that the provisions of the statute are aimed at the *seducer*, and not at his *victim*; besides, it is alleged in the indictment that the defendant's wife was in bad health and could not live long, and that he promised to marry her after his wife's death.

The mother of the human race was tempted and fell, and the object and theory of our law is to punish the tempter, the seducer, whether he be a married or an unmarried man. If the defendant truthfully represented to Miss Chivers that his wife was in bad health and could not live long, and promised to marry her after his wife's death, and thereby persuaded and

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induced her to yield to his lustful embraces, and allowed him to have carnal knowledge of her, then he would be guilty of seduction under the provisions of the Code. If the defendant falsely and fraudulently represented to her that his wife was in bad health and could not live long, when in fact she was not in bad health, and conditionally promised to marry her as before stated, and thereby persuaded and induced her to yield to his lustful embraces, etc., then he would be guilty of seduction, notwithstanding he was a married man.

Persuasion and promises of marriage are not the only means contemplated by the statute by which a virtuous unmarried female may be seduced. The statute did not intend to enumerate all the means to which the artful seducer might resort to accomplish his purpose, but if he promises marriage, or by "other false and fraudulent means," seduces a virtuous unmarried female, he would be guilty of seduction, although he might not have promised marriage. The other means employed to accomplish his purpose, as contemplated by the statute, must be such as the law will recognize to be *false* and *fraudulent*, according to the legal sense of those words, as applicable to the facts of the case. As if the defendant although a married man, being the pastor of the church of which the young unmarried female was a member and her school teacher, as is disclosed by the evidence in this record, having her entire confidence, told her that he loved her, and asked her to return his love, and if she would allow him to be intimate with her he would not harm her, would not hurt her feelings for the world, that he had thought of all this before and knew it was not wrong; had made it a subject of prayer, had prayed to be directed right, that his conscience did not smite him for the course he was taking, that he believed if it had been wrong that Providence would have interposed some way to prevent it, that he had that much confidence in God that he believed that some obstacle would have been interposed to their intimacy, that his wife did not love him and had refused to have anything to do with him, that he had no one in whom he could place confidence, and begged her to trust him wholly, and not to be so

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reserved, that she must know that if he did anything wrong it would hurt him as much as her, that she might know that he would not injure himself, etc.

In view of the relative position which this unmarried female occupied towards the defendant, the means employed by him to seduce her, come within the definition of "other false and fraudulent means," as contemplated by the statute, and the fact that he was a married man at the time, and that his victim knew it, does not protect him against the crime of seduction, as charged in the indictment, and, in my judgment, there was no error in sustaining the demurrer to the defendant's plea. The object and intention of the statute was to protect the virtue of unmarried females against seduction, by married as well as unmarried men, either by persuasion and promises of marriage, absolute or conditional, or by other false and fraudulent means, and to punish the offender therefor in the Courts, so as to prevent the injured parties or their friends from seeking redress by the punishment of the offender with their own hands. The statute is a beneficial one, and I am not disposed, as a judicial magistrate, to restrict its operation so as to defeat its object and manifest intention. The motion in arrest of judgment was properly overruled.

The offense as charged in each count in the indictment is sufficiently technical and correct, and states it in the terms and language of the Code, and so plainly, that the nature of the offense charged might have been easily understood by the jury. It is only necessary to allege in the indictment such facts as make out the offense under the provisions of the Code. All the evidence expected to be introduced on the trial need not be set forth in the indictment, and, therefore, there was no error in the Court in admitting evidence pertinent to the issue on trial, because it was not set forth therein.

It is insisted that the Court erred in charging the jury "that the presumption of law is that she, Emma I. Chivers, the female alleged to have been seduced, was virtuous, and that presumption remains until removed by proof. She must have personal chastity. If she, at the time of the alleged se-

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duction, had never had unlawful sexual intercourse with man, if no man had then carnal knowledge of her, she was a virtuous female within the meaning of the law. If man had then carnal knowledge of her, had had sexual intercourse with her, she was not a virtuous female within the meaning of the law."

This charge of the Court was, in my judgment, a correct interpretation of what the statute means by a virtuous unmarried female. If the unmarried females in this State are not, in the eye of the law, presumed to be virtuous until the contrary is shown, the condition of our unmarried females is quite different from what I have always supposed it to be, and cannot, by my judgment, sanction the contrary presumption that they are not virtuous, but must affirmatively prove that they are so. The presumption of the law is that all of our unmarried females are virtuous, and that the reverse thereof is the exception. The proposition contended for, as applicable to our unmarried females in this State, is simply monstrous. The public morals of our people have not yet become so corrupted that the law will presume that our unmarried females are not virtuous, and if such a state of things existed, it would be a very cogent reason why the statute against seduction should be enforced for the protection of society generally.

But it is said the Court erred in its charge, in not submitting the question to the jury, under the evidence of Collier and others, whether Miss Chivers was a virtuous unmarried female, as contemplated by the statute, at the time of her alleged seduction by the defendant. The Court did charge the jury that if she had never had unlawful sexual intercourse with man, if no man had then had carnal knowledge of her, she was a virtuous female, within the meaning of the law, but if man had then carnal knowledge of her, had had unlawful sexual intercourse with her, she was not a virtuous female, within the meaning of the law. If that was not the proper standard by which a virtuous female should be tested, in the sense of the statute, what shall be the proper standard? If

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she had her pristine virtue at the time the defendant seduced her, and he deprived her of it, was she not a virtuous female, in the sense that word is used in the statute? Will the wayward, imprudent acts of a school girl, the allowing improper liberties to be taken with her person in play, or otherwise, rebut the presumption of the law that she is a virtuous female, in the sense of the statute, and that she has had carnal knowledge of a man? In the estimation of some people, if an unmarried female wears her dress too short or too low, and thereby exposes her person, she might not be considered a virtuous female.

What shall be the test of a virtuous unmarried female, in the sense and meaning of the statute, unless we adopt that as stated by the Court in its charge to the jury? In my judgment, so long as an unmarried female retains her personal chastity, she is a virtuous unmarried female, within the true intent and meaning of the statute, and that he who persuades or induces her to surrender to him that personal chastity, in the manner as prescribed therein, is a seducer; in other words, if no man has ever before deprived the unmarried female of her personal chastity, the first man that unlawfully does so is the seducer of a virtuous unmarried female, as contemplated by the statute.

In this case, the female alleged to have been seduced had not only the presumption of the law in favor of her being virtuous, but she stated positively, in her evidence, that no man had ever had carnal knowledge of her but the defendant. Was there anything in the evidence of the defendant which, in the judgment of the law, would rebut the presumption of her being a virtuous unmarried female, in the sense of the statute, and her sworn statement that she was so at the time of the alleged seduction?

Whether the jury believed the statements of Collier, I do not know, that was a question for them, but what were his statements in relation to Miss Chivers' personal chastity? In 1867, he went to school with her to the defendant; she called him to her one day in the school room, and told him to sit by her,

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he did so, and she took his hand, put it inside her bosom next to her skin, he felt her legs, hugged and kissed her. At another time, she told him that she would let him sleep with her that night, provided her mother was absent, agreed to go, but did not, was sick. At another time, one day about two o'clock, she sort of pulled up her clothes and asked him if he did not want to feel her legs; this was near the school-house where the boys were playing ball; she also told him one day in the school-house, that if he would call on her some night like a decent young man, and after he went out, wait on the railroad about half an hour or so, she would come out and meet him on the railroad; that arrangement was never consummated, was sick, and went home to Alabama, where he lived then and now. Take all this evidence of Collier to be true, and what of it? Does it prove that any man had carnal knowledge of her person, or that she was not a virtuous unmarried female in the sense of the statute, at the time of the alleged seduction by the defendant? The law presumes her to have been so, and she swore positively that she was so. So far as the evidence of Collier is concerned, admitting it all to be true, the citadel of her virtue remained *intact*; it was not captured by him, or any other man, up to the time of the alleged seduction by the defendant, so far as the evidence shows. It is somewhat remarkable, however, that Collier, being about nineteen or twenty years of age, who was so much *tempted* by this young lady, according to his account of it, did not improve the opportunities so gratuitously and repeatedly offered to him.

After all, the question on this branch of the case for the jury to decide, was whether Miss Chivers was a virtuous unmarried female at the time of the alleged seduction by the defendant, within the meaning of the statute; had she ever before that time had carnal knowledge of a man? Was she in possession of her personal chastity at *that time*, and did the defendant take it from her? The presumption of the law was in her favor, besides her positive evidence of the fact, and admitting all the evidence offered to prove the contrary

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thereof to have been true, still, it falls very far short of being sufficient, under the law, to rebut that legal presumption, and the proven fact that she was, at the time of the seduction, a virtuous unmarried female, in the sense and meaning of the statute.

There is no evidence offered by the defendant which approximates to the establishment of the fact that she had carnal knowledge of any man prior to the alleged seduction. The evidence of Collier, if true, proves improper conduct on her part, but there is nothing in that evidence which would authorize the jury, under the law, to find that she had carnal knowledge of him, or any *other man*. I will not say that evidence of a man and woman being found in bed together, or other acts of a similar character, which, under the law, would raise a violent presumption of unlawful sexual intercourse between the parties, would not be sufficient evidence of carnal knowledge of each other to authorize the jury to so find; but there are no facts of that kind proved in this case, or any other facts which, under the law, would raise a violent presumption that she had had carnal knowledge of any man other than the defendant, and, for that reason, there was no error in the charge of the Court of which the defendant can complain. The Court ought not to have charged the jury upon an assumed state of facts not proved by the evidence, but the Court did charge the jury that she must have had personal chastity, that if man had carnally known her, had had unlawful sexual intercourse with her, she was not a virtuous female within the meaning of the law, and left the jury to decide that question, under the evidence, in relation to that point in the case, including Collier's evidence, as well as that of the other witnesses.

Where is the evidence in this record that raises a violent presumption under the law, that Miss Chivers ever had at any time carnal knowledge of any man other than the defendant, which would have authorized the Court to have charged the jury in relation to it? When a defendant is indicted on the criminal side of the Court for seducing a virtuous unmarried

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female, it is not a good legal defense for him to *black ball* her character by proving loose declarations, imprudent or immodest conduct on the part of his victim; but he must go further, and prove that she had lost her personal chastity prior to his alleged seduction of her, or he must prove such facts as, under the law, would raise a violent presumption that she had done so, such facts as, under the law, would authorize a jury to find that she had had unlawful sexual intercourse with a man. To hold otherwise will make the statute which was intended to protect the personal chastity of unmarried females not worth the paper on which it is written.

It was not the object of the statute to protect *the defendant's personal chastity*, as the argument assumes, but the object of it was to protect the personal chastity of the unmarried female against his attempts to take it from her, no matter what may *now* be his pretexts or excuses for depriving her of it. If she was such a notorious character as he would now have us to believe, why did he not have her excluded from the church of which he was the pastor. Is it a legal defense for him now to say that he was seduced to deprive her of her personal chastity? The argument amounts to just that and nothing more.

It was not a question of *damages* that was involved on the trial of the accusation, or whether the defendant was guilty of the offense of adultery and fornication, but *the* question was did the defendant deprive the unmarried female of her personal chastity, as alleged in the indictment. If she had lost it before, then he did not deprive her of it, for he could not take from her that which she did not have. The law, however, presumes that Miss Chivers was a virtuous unmarried female in the sense of the statute, at the time of the alleged seduction; she swore that she was, and taking all the evidence offered by the defendant to show the contrary thereof to be true, it is not sufficient, under the law, to have authorized the jury to find that she was not a virtuous unmarried female as contemplated by the statute, and who could not have been seduced and deprived of her personal chastity by the defendant, as

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alleged in the indictment. In my judgment, there was no error in the refusal of the Court to charge as requested or in the charge as given, of which the defendant had a right to complain, in view of the evidence contained in the record. If the jury believed the testimony of Miss Chivers and her mother, (and that was a question exclusively for their consideration) then the verdict was unquestionably right, and according to the repeated rulings of this Court, heretofore made, that verdict should not be disturbed. I am, therefore, of the opinion that the judgment of the Court below should be affirmed.

LEONIDAS N. CALLAWAY, plaintiff in error *vs.* THE MAYOR AND ALDERMEN OF THE CITY OF MILLEDGEVILLE, defendant in error.

TOLL & DOERFLINGER, plaintiffs in error *vs.* THE MAYOR AND ALDERMEN OF THE CITY OF MILLEDGEVILLE, defendant in error.

A municipal corporation which has, without authority of law, levied and collected a license fee for retailing spirituous liquors, is liable to an action by the party paying the same for the recovery of the amount of the fee thus paid.

Municipal corporation. License. Before Judge ROBINSON. Baldwin Superior Court. August Term, 1872.

The above cases, involving the same questions, were argued and decided together.

They were heard upon the following agreed statement of facts :

“The plaintiffs, Leonidas N. Callaway and Toll & Doerflinger, being liquor dealers within the corporate limits of the City of Milledgeville, were, by an ordinance of the City Council, required to take out licenses during the years 1866, 1867, 1868 and 1869, to retail spirituous liquors in said city, and for said license for the year 1866, Callaway paid to the

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clerk of said Council \$50 00, for the year 1867, \$151 00, for the year 1868, \$101 00, and for the year 1869, \$101 00. Toll & Doerflinger paid to said clerk for the year 1867, \$150 00, for the year 1868, \$101 00, and for six months of the year 1869, \$51 00. By a decision of the Supreme Court of Georgia, the power of the said City Council to grant license to retail spirituous liquors was denied, and therefore the exaction of said license fees was unauthorized. The Ordinary of the county of Baldwin now claims from the plaintiffs the amount of a county license to retail, for the years they were licensed as aforesaid by said City Council. The plaintiffs brought their actions to recover the amount of said license fees thus illegally exacted from them."

The Court dismissed both cases and the plaintiffs excepted.

I. L. HARRIS; SANDFORD & FURMAN, for plaintiffs in error.

L. H. BRISCOE, by Z. D. HARRISON, for defendant.

TRIPPE, Judge.

If an injunction will be granted against a municipal corporation to restrain the collection of an illegal tax, will not an action lie to recover that tax if it be paid; can a reasonable reply in the negative be made? Is not an affirmative answer almost a necessary legal corollary? If a party can enjoin the doing of an act because it is wrongful, can he not recover damages when that act is done, especially if he suffer damage from it. In 42 *Georgia*, 235, it was decided that the City Council of Milledgeville had no authority to collect a license fee for the sale of liquors within the corporate limits of the city. In the case of *The Cherokee Bank and Insurance Company vs. Justices of the Inferior Court of Whitfield county*, 28 *Georgia*, 121, a *mandamus* was allowed against the Justices to force them to refund to the relators the tax for two years which it was held the county had illegally assessed and collected from them. The principle that allowed the *mandamus*

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in that case would sustain the common law action in this. It is hardly possible to conceive a case, except in certain instances of *pari delicto*, where a party illegally obtaining money cannot be made to pay it back. Here the same party (the city) who got the money is called on to repay. It is not like a case of attempted recovery for error of judgment in judicial officers. Nothing is demanded of the officers who committed the error. They did not act judicially in assessing and collecting the tax. The city has the money, and under the decision of this Court has it illegally, and on the principle of returning what *ex æquo et bono* does not belong to it, should repay it. This is not like the case of a party voluntarily paying money to another under mere ignorance of the law. Here they do not stand on an equality. No suit would have been brought to enforce the demand. The claimants of the tax or license fee held the power of a government *in terrorem* over the plaintiffs in error. They could issue their own process to secure their demand, and, a levy and sale were the sharp and quick remedies to enforce it.

Judgment reversed.

MARTIN G. BRADY, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. Where the defendant was indicted for having used obscene and vulgar language in the presence of a female, without provocation, the absence of a witness by whom he expected to prove that the female was at one time pregnant and absented herself from the community in which she lived on that account, was no ground of continuance, as such proof, if introduced, would constitute no defense. (R.)
2. When obscene and vulgar language is used in the hearing of a female, the words are used in the presence of a female, as contemplated by the statute. (R.)

Criminal law. Continuance. Before Judge HARRELL. Terrell Superior Court. May Term, 1872.

For the facts of this case, see the decision.

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F. H. HARPER, by CLARKE & Goss; W. A. HAWKINS;
C. B. WOOTEN, for plaintiff in error.

JAMES F. FLEWELLEN, Solicitor General; LYON & IRVIN
for the State.

WARNER, Chief Justice.

The defendant was indicted for a misdemeanor under section 4306 of the Code, and charged with having used obscene and vulgar language in the presence of a female without provocation. On the trial the defendant was found guilty. A motion was made for a new trial on the grounds set forth in the record, which was overruled by the Court, and the defendant excepted.

1st. There was no error in overruling the motion for a continuance. The fact that the defendant expected to prove by the absent witness, that the female in whose presence the obscene and vulgar words were alleged to have been spoken was at one time pregnant, and absented herself from the community in which she lived on that account, did not constitute any legal defense for the defendant, under the law, for using obscene and vulgar language in her presence without any provocation, and her condition and absence from the community did not constitute such provocation.

2d. The words used by the defendant, as charged in the indictment, and proved on the trial, are admitted to have been quite obscene and vulgar enough to shock the moral sensibilities of all decent people; but it is said the words were not used in the presence of the female as contemplated by the statute. The evidence is that the female in whose presence the words are alleged to have been used, resided in a house close to defendant, just across the street, in the same village, and that the night the words were used, the female was at the house of a neighbor, about one hundred and fifty yards distant from defendant's house. Whether defendant knew she was absent from her own house at the time, does not appear, but he was standing in the piazza of his own house and spoke the words

loud enough for the female to hear them at the house of her neighbor, and they were addressed to the female by name, and called her "you damned old, " etc., etc. She heard the words distinctly, and it would seem from the fact that the words were addressed to her by name, that the defendant intended and expected she should hear them; at any rate, she did hear them, and, in our judgment, when obscene and vulgar words are used in the hearing of a female, the words are used in the presence of a female, as contemplated by the statute, the more especially when the obscene and vulgar words are addressed to that female by name.

Let the judgment of the Court below be affirmed.

ABEL A. LEMON, executor, *et al.*, plaintiffs in error vs. WILLIAM JENKINS *et al.*, defendants in error.

1. Where the issue upon trial was, whether a deed made by the grantor under which property acquired by his first wife, is conveyed away to the exclusion of his child by her, and under which the fee simple title is conveyed to his daughter by his second wife and the children of his brother, was the result of monomania and the improper influence exercised by his brother, which deed the grantor subsequently had taken up, and which he again confirmed, it was not error in the Court to allow a witness to testify that some time between the execution of the deed and the death of the grantor, he had heard him (the grantor) say that his brother was trying to get him to convey to the brother's children said property, which came by his first wife, and that he asked witness' advice about it; that at the time the brother was present with some papers he was endeavoring to induce the grantor to sign. (R.)
2. Upon such an issue it was not error for the Court to charge the jury that if the grantor, at the time of the execution of the first deed was laboring under monomania, caused by the marriage of his daughter, and the deed was the result of that monomania, they should set it aside. (R.)
3. The verdict of the jury being the decision of a tribunal appointed by law to pass upon facts, and being not contrary to, but rather supported by the evidence taken altogether, ought not to be disturbed. (R.)

New trial. Evidence. Monomania. Insanity. Deed. Before Judge GREEN. Henry Superior Court. October Term, 1872.

Lemon et al. vs. Jenkins et al.

Abel A. Lemon, as executor of Alexander Lemon, deceased, filed his bill against William Jenkins and others, containing substantially the following allegations:

Alexander Lemon died on December 17th, 1866, and shortly thereafter complainant qualified as his executor; the assets of the estate which have come to complainant's hands are insufficient to satisfy the debts of deceased. The second item of testator's will is as follows:

"Item 2d. That whereas, I did heretofore, to-wit: on or about the 13th day of November, 1861, make and execute to my daughter Eliza Ann Lemon, and the children of Abel A. Lemon, a certain deed of gift to a certain parcel of land, lying and being in the fourteenth district of Monroe county, and known in the plan of said district as lot number eighty-nine containing two hundred and two and a half acres, more or less; and, whereas, I did subsequently, to-wit: about the year of our Lord, 1863, make and execute to my daughter, then Mary Price, (now Jenkins) and her heirs, a deed of gift to the same tract or parcel of land. It is my will that said tract or parcel of land shall, at my death, become the property of my said daughter Eliza Ann Lemon, and the children of Abel A. Lemon, to-wit: Elizabeth J. Lemon, Martha A. Lemon and Abel Alexander Lemon, share and share alike; that my executor hereinafter named, shall, in his discretion, sell said land at any time after my death, or if he thinks best, keep and rent it out or otherwise use said land, until all of the above named legatees become of age. And that no part of said land shall belong to my daughter, Mary Jenkins, or her heirs."

Complainant further alleges that on November 13th, 1861, testator made and delivered to the legatees mentioned in said item, who were then minors, a deed to said tract of land, which remained in the possession of complainant's family for one or two years, when it disappeared and perhaps may have fallen into the hands of testator. After the death of testator this deed was found, but in a mutilated condition, the names of testator and of the attesting witnesses having been torn off.

This instrument had never been recorded. On August 14th, 1863, testator executed a deed conveying said tract of land to one William Price in trust for the use of his wife Mary F. Price during her life, then to her children, and if no children, to her heirs. William Price died and his widow subsequently married the defendant, William Jenkins. Testator, on February 23d, 1865, having discovered that the first deed was lost or mislaid, reaffirmed the same under his hand and seal. William Jenkins and wife claim said land as do also the grantees in the first deed. Under these circumstances complainant cannot sell the same and apply the proceeds thereof to the payment of testator's debts without litigation. He therefore applies to the Court for its assistance in order to avoid a multiplicity of suits, etc. Prayer, that all of said deeds may be decreed to be canceled, and that the Court shall decree to whom said land belongs; that the writ of subpoena may issue.

The answers of the defendants are unnecessary to an understanding of the decision of the Court, and are, therefore, omitted. The bill, evidence and motion for a new trial clearly present the case.

The complainant introduced the following evidence :

Abel A. Lemon, the complainant, in addition to sustaining the allegations of his bill, testified as follows : The deed of November 13th, 1861, conveying the land in controversy to Eliza Lemon, the daughter of testator by his second wife, and to the children of complainant was drawn by complainant. It was signed by testator, and witnessed by Humphrey Tomlinson, John A. Smith, and Bushrod Pettit, a Justice of the Peace, in the presence of complainant. Testator then took the deed, called up the children, and delivered it to his daughter Eliza for herself and the others. Eliza handed the deed to complainant and requested him to keep it. Testator was complainant's brother. He requested complainant to write the deed for him. Advised him to make a will. He refused. Complainant put him off once or twice, until he said that if complainant would not prepare the deed, he would get

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some other person to write it for him. Kept the deed six or eight months, perhaps longer, when testator asked for it. Complainant told him that he had no right to give up the deed, but disliking to refuse him, prepared an exact copy of the original. Some time after this, testator and his son-in-law, William Price, came to see complainant, and testator requested a settlement of money matters between them, and while complainant was looking up the papers showing testator's indebtedness to him, testator asked for the deed. Complainant found it and placed it on the table. Testator's indebtedness to him at that time was more than \$1,500 00. He paid in cash all over that amount, and gave me his note, with Price as security, for the balance. Complainant then left the room. At this time Price held the deed in his hands and was reading it. When complainant returned, testator and Price were gone and the deed was missing. Never asked testator or Price for the missing deed, as he had a copy. Never saw this deed again until he found it in the office of John R. Hart, Esq., when he took it up and said it was his property and he should keep it. When the deed was taken from the possession of complainant it was not mutilated; when he found it again the names of the maker and of the attesting witnesses were torn off. The deed was executed at the house of testator. He was sober and perfectly capable of making any contract. The deed was read over to him in the presence of the witnesses. He executed it freely and voluntarily. Complainant did not influence him to execute the deed, but advised him to the contrary. Does not know who mutilated the deed. Testator frequently sent for complainant to advise him in his business. Sometimes drew papers for him. Was usually with him on such occasions. On the occasion that the deed of November 13th, 1861, was executed, complainant drew a deed for testator, in which he conveyed his negroes to his wife for life, remainder to his daughter Eliza, and in case she died without issue, remainder over to the children of complainant. Thirty or forty negroes were conveyed. Complainant was appointed trustee. Testator had lost one eye,

suffered from rheumatism, and could not move about well. He sometimes took a drink, but never saw him when he was unable to make a contract or to transact his business. In 1861, testator's daughter, Mary, was eighteen or twenty years old. Price ran away with her and married her. Testator was displeased with this conduct. When he was in trouble he did not drink. He was very much enraged at this marriage. He cried and cursed about it. The deed was made on the second day after her marriage. The land in controversy was drawn by Mary's mother and her sister, Eliza Smith, as orphans. When the deed of 1863 was executed, testator and Price and his wife were friendly. Price died before the testator. When Mary married Jenkins, testator was very much opposed to it and tried to keep her from it. The certificate by which he reaffirmed the deed of 1861 was prepared by complainant and signed immediately after Mary's second marriage. Complainant also drew the copy deed to which said certificate is attached.

Humphrey Tomlinson proved the execution and delivery of the deed of November, 1861.

John A. Smith corroborated Tomlinson as to the execution and delivery of the deed, and testified additionally as follows: Witness conversed with testator for some time before the other witnesses to the deed came in, about making a will and not a deed; told him that if he made a deed he never could revoke it if he subsequently changed his mind, but if he made a will he could change it. Testator replied, "No, I intend to make a deed, so that it cannot be changed, for my determination is, and I have made up my mind, that my daughter Mary shall never have the wrapping of my finger's worth of my property, and there is no use in talking about it." Testator was competent to transact business, and executed the deed freely and voluntarily. He was neither drinking nor drunk at the time. Has known testator for many years, and have never seen him in a condition incompetent to transact his business. He was greatly excited—mad about Mary's marriage. He cried during the time witness was there.

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Doctor Tye testified as follows: Knew testator for twenty-five or thirty years; was his family physician in November, 1861. He was capable of attending to his business and of making any sort of contract. He was an excitable man and sometimes drank liquor. He kept it in his house. He was sometimes pretty far along in drink.

The answers of Andrew J. Cloud to a set of interrogatories were substantially as follows: Testator told witness that he made a deed in 1861, conveying the property in dispute to his daughter Eliza and the children of complainant. Afterwards saw the deed; it was signed by John A. Smith, H. Tomlinson and B. Pettit, Justice of the Peace, as witnesses. Does not know when the deed was executed, except from the date it bore. It was dated November 30th, 1861. Compared the copy deed prepared by complainant with the original before it was mutilated, and found it correct. This occurred at the house of complainant, at McDonough. Complainant had the original and the copy in his possession at the time. Testator was very much opposed to his daughter's marriage, but never saw him act like a wild man. He told witness that she should never have any of his property. Has no clear recollection on the subject, but it is the impression of witness that he witnessed a deed from testator to his daughter, Mrs. Jenkins. Has heard testator say that this property came by his first wife.

Complainant introduced the original deed of November 13th, 1861, in its mutilated condition, and the examined copy thereof.

The depositions of Eliza Barham, formerly Lemon, the daughter of testator, of Nancy Lemon, his widow, of Minerva Lemon, his sister-in-law, and of Elizabeth J. Lemon, corroborated substantially the testimony of complainant as to the execution of the deed of November 13th, 1861, and as to the condition of testator at the time. They further testified that no influence was used on testator to procure said deed, but supposed it was caused by the marriage of his daughter Mary with William Price against his wishes; that complainant only

prepared the deed under the threat of testator that unless he did so he would procure the services of some one else; that William Price and his wife were aware of the existence of said deed soon after its execution.

Complainant introduced testimony to show the indebtedness of testator, unnecessary here to set forth, and closed.

The defendants, Jenkins and his wife, introduced the deed of the 15th of August, 1863, conveying said property to Price as trustee for his wife.

Thomas M. Speer testified as follows: Testator would not sell the land in controversy because he became the owner of it through his first wife, and said he intended it for his daughter Mary, her only child. Witness endeavored to purchase it repeatedly, but testator always refused to sell for the above reasons. About the time of Mary's first marriage he drank a great deal. Had offered more than \$3,000 00 in gold for the land. The additional fifty acres embraced in the deed to Mary, of 1863, was worth \$10 00 or \$12 00 per acre. Never saw testator when he was not competent to transact business.

Dr. Manson testified as follows: In 1851 or 1852, a Mr. Tanner offered \$4,000 00 for the lot. Witness advised testator to sell it. He said that he would not sell it at any price, that the land came by Mary's mother and he intended it for her. Never saw testator when he was incapable of attending to business. Witness refused to marry Mary to Price because he thought she was too young. Testator was a very excitable man. In a trouble in reference to a daughter's marriage, witness knows no man who would have been more excited. There was no reason why he should have been in so excited a condition. During excitement, which is continued, the blood tends to the brain, until it would or might produce apoplexy.

James B. Crabbe testified as follows: Has heard testator say many times that the land in controversy came by Mary's mother and he intended to keep it for her. Saw Price steal Mary at the time he married her. As soon as Price and Mary ran away, testator came running by witness' shop, say-

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ing he was ruined, that Mary had run away. The next day he was very much excited, crying and cursing. Saw him take a drink. Some time after this testator became reconciled to Price and his daughter. Saw Price and his wife at testator's house.

Charles Walker testified as follows: Has heard testator say that the lot in controversy came by Mary's mother and he intended it for her. Price was a clever, hard working man, of good family. Testator and witness had been very friendly previously to Mary's marriage, but he would not speak to witness for six months afterwards, either because he thought witness' son had assisted in stealing Mary or because he heard that witness was to have married them.

James M. Hambrick testified as follows: Has heard testator say that the land in controversy came by Mary's mother and he intended it for her. Witness boarded at testator's house. For many nights after Mary's marriage, when witness woke up, he would hear testator making a noise as with a stick, saying he was ruined, and in the morning he would be in the back yard crying, beating the ground with his stick and saying, "Oh! my child! my child!" This furious excitement continued for two or three days. From what witness saw and heard, he does not think that testator was competent to contract. When he had business to transact, he would send for complainant. Has heard him speak oftener of Mary than of Eliza. He did not go to the table for a week after Mary's marriage. Thinks that he indulged Mary that he might induce her not to marry. Witness is of counsel for Mary Jenkins and collected the testimony.

The defendant, Mary Jenkins, the daughter of testator, testified as follows: Married Mr. Price on November 11th, 1861. Was then nearly fifteen years old. Testator had told her ever since she was a child that the land in controversy was for her. Was reconciled to testator about six months after the marriage. He was sick and sent for defendant and her husband about midnight; they went at once. The next year they lived in the same house with testator for about three months. Was

present when he made the deed to her in 1863. Q. R. Nolan and Mr. Cloud attested the deed. This instrument, the mutilated deed and the deed to his negroes, were delivered to defendant by testator, who told her to hold them for her protection. Testator sent the money by Mr. Price to buy the additional fifty acres already mentioned. Defendant married Jenkins on February 19th, 1865. Testator was angry about this second marriage for nine or ten months. Has six children; the oldest is ten years of age.

James A. Maxwell testified as follows: Has heard testator say that the land in controversy came by Mary's mother, and he intended to save it for her. Has frequently heard Tanner offer testator \$7,000 00 for said property in gold, but he would not sell it because it was for Mary. In 1861, testator was diseased, feeble in health, walked bent over, and with a stick. He always had liquor about his house, and drank it. On the day after Mary's first marriage he appeared to be mad with everybody; he was making a powerful fuss; he would walk forward and back through the house, going on at a terrible rate, making a noise. He seemed to be reckless for a week or two. He sent for witness a few days after Mary's first marriage, and said he was ruined, and that he did not care to live a day longer, as Mary had run off. Said he would not give Price any property. Has heard him say that Mary was his favorite child; that he had bought her a piano, and had gone to great expense about her, and yet she had run off. Testator was opposed to Mary's second marriage. Witness believes he was clerk of the Superior Court at the time, and that he had attested a paper executed by testator. (The reaffirmance of the deed of 1861.) Testator had mind enough to execute said paper, and acted voluntarily. Has seen him several times when he was not competent to attend to business. Does not think he was capable of transacting business when the deed of 1861 was executed.

A. W. Turner testified as follows: Has frequently heard testator say that the land in controversy came by Mary's mother, and he intended it for her. This conversation was

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after the second marriage of testator, and after the birth of his daughter Eliza. Testator and witness would frequently go to testator's house and take a jovial drink together and talk about said lot. On the day after Mary's first marriage, he was crying, cursing and beating the ground with his stick. On the second day he was no better, and could be heard all over the town. He afterwards became reconciled to Price. On the day of the marriage, and the day after, testator was incapable, from drink and madness, of attending to business. Testator endeavored, by his indulgence to Mary, to wean her off from marrying. He obtained a considerable amount of property by his second marriage, but it did not go into his possession. Understood that complainant was the confidential adviser of testator. Never heard him talk about Eliza; he always talked about Mary.

L. H. Turner testified as follows: Has heard testator say that the land in controversy came by Mary's mother, and he intended it for her. On the day after her first marriage, saw testator in the street, knocking on the ground, stamping, knocking his hands and talking to himself. He said Mary had run away; that Tom Harper stole her for Price; that he wanted to kill them all—Tom, Price and Mary—and then wanted somebody to kill him. Does not believe that he was competent to transact business. On the next day he was still carrying on in the same way.

Defendants then introduced the depositions of Lucius Maxwell, the only material portion of which is the answer to the eighth interrogatory, to all of which complainant objected. The objection was overruled and complainant excepted.

The answer is as follows: "When I saw him (testator) in 1861, he told me that his daughter Mary had not married to please him. He stated to me at some time between 1861 and 1865, but at what particular time I do not remember, that Abel Lemon (complainant) wanted him to make a deed to his, Abel's children, and remarked that the property which he wished deeded was obtained or came by his first wife, and asked my advise in the matter. I was present at a time with-

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in the period named when Abel Lemon came in at the back way, and had some papers which he wanted Alexander Lemon to sign. Alexander Lemon declined doing so at the time, and Abel Lemon insisted on his signing, but I do not know what the papers were or if he signed them. They went into the house and left me in the veranda. Alexander Lemon afterwards came out and said that Abel Lemon wanted him to make, or he had made a deed to Abel's children, I do not now remember which, but I do know that he did say, that he was not satisfied, or disposed to do as Abel Lemon would have him to do in the matter."

The jury returned the following verdict: "We, the jury, set aside the deed made to Eliza Lemon and others, in the year 1861, by Alexander Lemon, and establish the deed made by Alexander Lemon in the year 1863, to Mary F. Price. We find enough of property in our judgment to pay all of the indebtedness of the estate, at the time this deed was drawn."

Whereupon complainant and the donees, under the deed of November 13th, 1861, moved for a new trial upon the following grounds, to-wit:

1st. Because the Court erred in admitting in evidence the answer of Lucius Maxwell to the eighth interrogatory.

2d. Because the Court erred in charging the jury, "that if the donor was laboring under monomania growing out of the marriage of his daughter, and the deed was the result of such monomania, at the time he executed the same, then the deed was void.

3d. Because the verdict is contrary to the evidence.

The motion was overruled and movants excepted upon each of the grounds aforesaid.

D. J. BAILEY; J. J. FLOYD; GEORGE M. NOLAND, for plaintiffs in error.

SPEER & STEWART; PEEPLES & HOWELL, for defendants.

McCAY, Judge.

We do not think the testimony of Maxwell of much moment either way. The only objection to it is to its relevancy, and we are free to say that the case, with or without it, would, in our judgment, be about the same. Still, we cannot say it was irrelevant. It went to show, at least, that the deceased was in the habit of referring to his brother, that papers were sometimes pushed upon him by his brother, and that relations did exist between them calculated to cast suspicion upon a deed in the brother's handwriting for the benefit of his own children.

The great question at last in this case is on the evidence. Whether the charge was right, depends upon whether there was evidence of the insanity of the maker of the deed to Abel Lemon's children at the time it was made, and if this evidence does exist, it was not an abuse of the discretion of the Judge to refuse a new trial.

The old common law rule that a man cannot stultify himself, like many other of the dogmatic, fanciful rules that seem to have been adopted in the early history of the common law, on certain abstract logical reasonings, has given way to a large extent in Courts of equity even in England, and is cut up by the roots in our Revised Code, sections 2693, 2694, 2695. It is in this State simply a question of fact, with no logical obstruction to meet. Was the maker of the deed in such a condition of mind as rendered him incapable of making the deed? It must be remembered that there was no consideration passed, and there is not, therefore, the technical difficulty of his having taken and *kept* the money or property of the grantee.

The deed was purely voluntary. It must be remembered, too, that this was not a will; for, in order to secure to a man the care and attention of those dependent upon him in his last days, the law keeps in his power the right to make a will, even when his capacity is less than would invalidate any contract or deed of gift he might make, to take effect immedi-

ately. In looking closely into this testimony, we are not able to say that the evidence of the sanity of the maker of this deed is such as to show an abuse of discretion in the Judge in his refusal to set aside the verdict. We think there is a good deal of evidence to support the charge and the verdict. The man who would exhibit himself in the streets, as did this distressed and afflicted old man, who would make the night hideous with his cries, certainly presented some evidences of insanity. His determination to make a deed instead of a will, to cut down behind him the means of retreat, the consciousness thus displayed, that when his fury passed, other counsels might, and probably would, prevail, is itself an element of unsoundness of mind. How different from the counsel of the sage, to hold your hand when anger is upon you!

That this daughter had done wrong, had outraged her father's affection, and that it was but just to punish her, does not, as it seems to us, help the case. The very enormity of her offense, acting upon the peculiar temperament of this excitable old man, only makes it the more probable that it had, for the time, unhinged the intellect. Indeed, as the great dramatist of nature has shown, there is nothing so well calculated to run a man mad as the ungrateful conduct of a thankless child.

We feel with this jury that, a deed obtained under the circumstances, is not entitled to be treated as the free-will act of a sane man. For three or four days after his daughter left, it is plain he was wild with mortification, vexation, anger and grief. His mind was full of strange fancies, it was distempered, disturbed, distracted, and ready at times even to commit murder in its vagaries. And we do not think this is met by the proof that at the moment of this signing—this carrying into effect—of the mad fancies flashing through his disturbed and distracted mind—he was calm in appearance. The act itself, and his statement *then*, that he wanted a deed and not a will, show that it was only on the surface that the calm existed, and that the full tide of distempered, insane rage and fury was still surging beneath.

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Perhaps the language of the Judge in his charge is not strictly applicable to the facts: Technical insanity can, perhaps, hardly be predicated of the condition of the mind of old Mr. Lemon. But that state of mind which makes a man's contracts void—whether it be insanity, distress, delusion, weakness, distempered fancy, or what not—can, we think, be fairly inferred. The act was the act of a man not fairly at himself, not capable of dealing with the brother at his elbow, ready to put into the mouths of his own children the bounty his distracted brother, in his madness and fury, was casting away.

We will not disturb this verdict. The jury—the twelve neighbors of Mr. Abel Lemon and his children—have, on their oaths, declared that the evidence satisfied them this old man was, at the making of the deed, not in a condition to make a contract, and we think there is evidence enough in the record to justify them in this declaration.

Judgment affirmed.

REUBEN JOHNSON, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.

There not being sufficient evidence to support the verdict, a new trial should have been granted. (R.)

New trial. Before Judge COLE. Bibb Superior Court.
April Adjourned Term, 1872.

For the facts of this case, see the decision.

R. W. JEMISON; R. W. STUBBS, by brief, for plaintiff in error.

E. W. CROCKER, Solicitor General, by Z. D. HARRISON, for the State.

TRIPPE, Judge.

Reuben Johnson (the plaintiff in error) and John Day, were jointly indicted for simple larceny, the act charged being the stealing of a horse. Plaintiff in error was put on his separate trial. The facts proven on the trial were as follows: A witness, who was at the house of the person who owned the horse alleged to have been stolen, on the night the offense is charged to have been committed, heard a noise at the stable, and went to see what it was. Before he reached the stable a shot was fired from the lane. Witness saw a person run as soon as he fired, but could not see who it was, or whether he was white or black. Witness called another man who was living on the place, who came and went to the lot, and met the horse returning to the stable; got a light, found the lock broken on the stable door, and a window broken open in the harness house, some five or six rods from the stable. Some tracks were found near the stable, one of which corresponded with the shoes worn by the prisoner, and some articles which were taken from the harness house were found at prisoner's house, where John Day also lived.

John Day, the co-defendant in the indictment, was introduced by the State, who swore that when he was arrested he was "scared," and told Mr. Brantly (the owner of the horse,) that he and the prisoner were at his place for the purpose of getting the horse, but they were not there; that he told Mr. Brantly they were after the horse, and that prisoner broke the stable and took the horse out. He further stated that he did not remember what he told Mr. Brantly, as he was "scared," and that he and prisoner were not at Mr. Brantly's place.

It does not appear positively that these confessions of Day, as contained in his evidence, were made in the presence of prisoner. But as one of the grounds in the motion for a new trial was founded on the admission of these confessions, against the objection of prisoner, and a note to said ground states that the confessions of the witness Day were not admitted except they were made in the presence of the prisoner, we

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presume it was in evidence that they were made in prisoner's presence. No other witness testifies to Day's confessions, nor does the record show what the prisoner said or did when they were made, nor indeed anything about the prisoner in connection with said confessions, except as they refer to him.

The jury found the prisoner guilty. A motion for a new trial was made on three grounds, two of which seem to be stricken, so far as we can determine, leaving only one ground, to-wit: "That the verdict is contrary to law and contrary to the evidence, and decidedly and strongly against the weight of the evidence." The Court overruled the motion for a new trial, and error is assigned on the refusal to grant a new trial.

The real question to be determined is, was there sufficient proof of the *corpus delicti*—that the horse was stolen? It appears that the stable was broken open, but it was not proven that the horse was in the stable at the time it was so broken, or that he had been locked up or put in it that night. It was in proof that when the pistol or gun was fired the horse ran towards the stable, but not from what direction, whether from where the parties making the noise were, or from the opposite direction. It was not shown that a halter, or bridle, or anything was on the horse, indicating that he was being led or rode off. It is quite apparent from the testimony that certain articles were taken from the harness house that night, and strong grounds given to believe that the prisoner was there as a thief, and did get some of those articles, for in addition to the tracks which were discovered next day, some of those articles were found in his house. But does not the fact that the thief took off "bridle-reins," etc., suggest that he could have still more easily taken off the horse?

As to Day's testimony, he states under oath when introduced by the State, that he admitted his and prisoner's guilt to Mr. Brantly, the owner of the horse. Neither he nor any witness says this was done in presence of prisoner, or if it was, how prisoner was affected by it—what he said or did. Day, under oath, as a witness for the State, denied the truth of the confession. As confessions of an accomplice, or joint

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offender, they were not admissible, and proved nothing against the prisoner, for they were made "after the enterprise was ended." If they were intended as *quasi* confessions of prisoner, by showing that he, by his silence or some act of his, acquiesced in or admitted their truth, then all that should have been proven. As this portion of the evidence appears from the record, it amounts to nothing against the prisoner. We make no point on the fact that the witness, Day, denied on the stand the truth of these confessions. Taking the whole of the testimony together we do not think it sufficiently establishes the fact that the horse was stolen to authorize the verdict of guilty. This being so, a new trial should have been granted.

Judgment reversed.

JOHN DOE, *ex dem.*, ANDREW LAMAR *et al.*, plaintiffs in error, vs. RICHARD ROE, casual ejector, and CORNELIUS TURNER *et al.*, tenants in possession, defendants in error.

1. The recitals in a deed only bind the parties to that deed and those claiming under them, but are not evidence against one who does not claim under any of the parties to it, either as a privy in law or as a privy in estate, but under a title wholly independent of them. (R.)
2. There being no evidence that the title to the land sued for has ever passed out of the drawer, except as contained in the recitals of a deed made by the heirs-at-law of the drawer to the plaintiffs, the deeds constituting the chain of title from one to whom the property was alleged to have been conveyed, in said recitals, by the drawer, were properly excluded as against the defendants who claimed under a distinct and independent title. (R.)
3. Does the voluntary purchase of a tract of land by a minor, after the statute of limitations has commenced to run, take the case out of the general rule, that no prescription works against the rights of a minor during infancy? Query? (R.)

Ejectment. Deed. Recitals. Evidence. Statute of limitations. Prescription. Minors. Before Judge HARREL. Terrell Superior Court. May Term, 1872.

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For the facts of this case, see the decision.

VASON & DAVIS, for plaintiffs in error.

The defendants did not claim under Delay and had no right to complain. Code, sections 2520, 3732, 3733; 11 Ga. R., 460; *Ibid.*, 520; 8 Ga. R.; 12 Ga. R., 52.

F. H. HARPER, by CLARK & GOSS; W. A. HAWKINS; PHIL COOK, for defendants.

WARNER, Chief Justice.

The plaintiff brought an action of ejectment on the several demises of the heirs-at-law of James Delay, and the heirs-at-law of Andrew Lamar, against the defendants to recover the possession of a lot of land in the county of Terrell. On the trial, the jury found a verdict for the defendants. A motion was made for a new trial, on the grounds set forth in the record, which was overruled by the Court, and the plaintiff excepted. The plaintiff introduced a grant from the State to James Delay for the lot of land in dispute. The plaintiff then offered in evidence a deed made by the heirs-at-law of James Delay to the heirs-at-law of Andrew Lamar, dated 24th of October, 1866, in which deed it was recited that James Delay, the drawer of the lot of land in dispute, now deceased, did, on the 10th day of January, 1837, sell and convey said lot of land to one Thomas Hancock, and that Hancock conveyed the same to Robinson, that Robinson conveyed it to John B. Lamar, and that John B. Lamar conveyed the lot to Andrew Lamar. There was no evidence of any deed of conveyance of the lot of land by the drawer, James Delay, to Hancock, other than the recitals contained in the deed made by the heirs-at-law of James Delay to the heirs-at-law of Andrew Lamar, on the 24th of October, 1866. The defendant was in possession of the land, claiming it under an independent title. The Court ruled out the deeds, offered in evidence, made by Hancock to Robinson, Robinson to John B. Lamar, and the deed of John B. Lamar to Andrew Lamar,

on the ground that it did not appear that the title to the lot of land had ever passed out of the drawer, James Delay, except by the recitals in the deed made by his heirs-at-law in 1866. In our judgment, the deeds were properly ruled out as evidence of title to enable the plaintiff to recover the possession of the land from the defendants, who were in possession of the same, claiming under a distinct and independent title. The recital in the deed of the 24th of October, 1866, that James Delay had sold and conveyed the land in his lifetime, would only bind the parties to that deed, and those claiming under them. The recitals in that deed were not evidence against the defendants, who did not claim title to the land under or through any of the parties to it; they did not claim any title to the land under the parties to that deed, either as privies in law or as privies in estate, but under a title wholly independent of them. The recitals in a deed only bind the parties thereto and their privies, but not strangers. On the statement of facts contained in the record, the verdict for the defendants was right, and there was no error in overruling the motion for a new trial. It is not disputed that the defendants had been in possession of the land more than seven years under color of paper title and claim of right, but assuming that the heirs of Andrew Lamar, who were minors, *voluntarily* purchased a good title to the land, under the deed of 1866, after the statute had commenced to run in favor of the defendants, was such voluntary purchase by them of the land, such a voluntary undertaking of disability on their part as would cause the statute to cease to operate in their favor during their minority, under the 2876th section of the Code, or would the statute continue to run against them, notwithstanding their minority? In other words, does the *voluntary* purchase of a tract of land by a minor, after the statute has commenced to run, take the case out of the general rule as provided by section 2644 of the Code, that no prescription works against the rights of a minor during infancy? (Query?)

Let the judgment of the Court below be affirmed.

McKee vs. McKee et al.

RICHARD ROE, casual ejector, and JOHN G. McKEE, tenant in possession, plaintiffs in error, vs. JOHN DOE, *ex dem.* JAMES McKEE et al., defendants in error.

(TRIPPE, Judge, was providentially prevented from presiding in this case.)

1. To make out a case of a presumptive gift of lands, under section 2622 of Irwin's Revised Code, it is necessary to show that the exclusive possession of the child, without payment of rent, shall have continued seven years during the lifetime of the father, and if he (the father) die before the seven years is complete, the presumption provided for does not exist.
2. The "distribution" of an estate is *prima facie* presumed to have been by the methods pointed out by law, and that a return thereof has been made to the Ordinary, and parol evidence of the terms of the distribution is not admissible, unless it appear that there was no return, or some excuse shown why it was not presented.

Gift. Presumption. Statute of limitations. Distribution. Evidence. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1872.

James McKee and others, the heirs-at-law of Hockley C. McKee, brought ejectment against John G. McKee for parts of city lots numbers five hundred and twenty-three and five hundred and twenty-four, in Columbus, the declaration containing a count for *mesne* profits. The defendant pleaded the general issue.

Upon the trial the plaintiffs submitted the following testimony:

1st. Proof that the plaintiffs were heirs-at-law of Hockley C. McKee, deceased.

2d. Deed covering the premises in dispute from Samuel Boykin, executor, to Robert B. Murdock, dated January 5th, 1859.

3d. Deed covering the same property from Robert B. Murdock to Hockley C. McKee, dated.....

4th. Plaintiffs introduced the defendant who testified that his father, Hockley C. McKee, desired to give to each of his children, as they married, a home; that he told defendant

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to select a place, and defendant accordingly made the bargain for the premises in dispute with Murdock; that his father placed him in possession of the place and gave it to him for a home; that he had had exclusive possession of the place from the day of the purchase without payment of rent; that in 1861, he made a note to his father for \$....., payable thirty days after date, to show in case of his father's death, that he had received an advancement to that extent; that his father died in 1863. That defendant administered on his father's estate.

Counsel for defendant proposed to ask the witness the following questions: "Did you get any part of your father's estate in the distribution? If not, was it not because you had received the house and lot?" Upon objection made the testimony was excluded, and the defendant excepted.

The testimony being closed, the Court charged the jury, among other things, as follows:

"The exclusive possession by a child of land belonging originally to his father, without payment of rent, for the period of seven years, will create conclusive presumption of a gift and convey title to the child, unless there is evidence of a loan or claim of dominion by the father acknowledged by the child, or of a disclaimer of title on the part of the child, but to raise the presumption of a gift in such a case, the father must have been in life for the space of seven years from the commencement of the possession of the child. If the father died within the seven years, the rule will not apply."

To which charge the defendant excepted.

The jury returned a verdict for the plaintiffs for the six-sevenths undivided interest in the premises in dispute and \$1,650 00 *mesne* profits. Whereupon the defendant excepted, and now assigns error upon each of the aforesaid grounds.

R. J. MOSES, for plaintiff in error.

PEABODY & BRANNON, for defendants.

McCAY, Judge.

1. Assuming that this case is to be governed by section 2623 of the Revised Code, (though the original possession was taken four years before that provision was the law,) we think the Judge was right in his construction of the section. Its provision is, that "the exclusive possession by a *child* of lands originally belonging to a father, without payment of rent for the space of seven years, shall create a conclusive presumption of a gift and convey title to the *child*, unless there is evidence of a loan, or a *claim of dominion by the father*, acknowledged by the child, or of a disclaimer of title on the part of the child."

The whole idea of this law is based upon the conduct of the father—that he has for seven years allowed the son to keep his land without paying rent, and has claimed, for all that time, no dominion over it. And the presumption of gift and conveyance of title is clearly made to depend upon the *continuance* for seven years of these things. If, during one of the years, rent was paid, or if for but once during the period the father claims and the child acknowledges dominion, the presumption does not obtain. How can this state of facts exist, unless the father be alive for the whole period?

2. The ground of the exclusion of the evidence excluded does not affirmatively appear. But it was objectionable for two reasons: 1st. The question assumed there had been a division, and was objectionable as a question for that reason. 2d. A "distribution" is presumed to have been made by the usual means, and a return of it to the 'Ordinary is presumed to exist. That is the highest evidence of its details. There was no excuse offered for not producing this, the highest evidence of the facts connected with the division.

Judgment affirmed.

THOMAS G. W. McMEEKIN, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. Where a defendant is convicted of a misdemeanor and the judgment is that he do pay a specified fine and costs of prosecution, and he refuses to pay the fine and costs, the Judge has the power to order the clerk of the Court to issue an execution against the property of the defendant to enforce the collection of the fine and costs.
2. If, in addition to the fine, etc., the judgment directs that the defendant shall be held in custody until the fine and costs are paid, so that the imprisonment do not exceed six months, and the defendant is so held in custody and discharged at the termination of six months, without payment of the fine or any of the costs :

Held, That the imprisonment was no part of the penalty, and the power still existed in the Court to order the issue of the execution to collect the fine and all the costs.

Criminal law. Fine. Execution. Before Judge HARVEY.
Polk Superior Court. August Term, 1872.

The issues involved in this State arose upon a rule *nisi*, calling upon McMeekin to show cause why execution should not issue against his property for the purpose of collecting a fine of \$300 00 and costs, imposed upon him by the Court, upon his having been convicted of the offense of keeping open a tippling house on the Sabbath day.

It was admitted that the defendant had been convicted of said offense on November 24th, 1871, and that the following sentence was passed :

“A verdict of guilty being returned in this case, it is considered, ordered and adjudged by the Court that the defendant, Thomas G. W. McMeekin, pay a fine of \$300 00 and costs of this prosecution, and that he be, by the sheriff of said county, committed to the common jail of said county, and there safely kept, until said fine and costs are paid, so that said imprisonment shall not exceed the term of six months from the day of his commitment to said jail.”

That the sheriff, January 9th, 1872, committed said defendant to jail, and there kept him confined for six months and two days.

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After hearing argument, the Court ordered the execution to issue, and McMeekin excepted.

JOSEPH A. BLANCE, by E. N. BROYLES, for plaintiff in error.

IVEY F. THOMPSON, Solicitor General, by HAMILTON YANCEY, for the State.

TRIPPE, Judge.

We think the decision in *Brock vs. The State*, 22 Georgia, 98, settles the question whether the imprisonment was part of the penalty, and that it was only a means of enforcing the collection of the fine.

If a defendant in a criminal case is fined, and refuses to pay the fine imposed, can it be collected by an execution against his goods? etc. There is the judgment against him for a specific amount, and section 3584 of the Code provides that "the Judge of any Superior Court may frame and cause to be issued by the clerk any writ of execution to carry into effect any lawful judgment or decree rendered in his Court." It is contended that this section refers only to civil cases. But is not this a power inherently existing in the Court? And why should it be limited to civil any more than to criminal judgments? In one case, it is a debt due an individual; indeed, in civil cases it may also be for a debt due the State. In a criminal case the judgment is for a penalty, and it may be said due the State, and some of the authorities call it a debt of record. In *The King vs. Woolf*, 1 Chitty, 236, (18 English Criminal Law Reports,) the point was distinctly made and decided, that a *levari facias* might issue for a fine. Abbot, Chief Justice, said: "It seems to me that the case of *The King vs. Wade*, in which it was ruled that though one be in execution for a fine to the King, yet a *levari facias de bonis et catallis* lies, is a decisive authority in the present case. It is an authority founded upon the general principle of the common law, and shows that a *levari facias* may issue for a fine due

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the King, a fine being in fact a debt of record." Bayley, Judge, said: "The only question we have to consider is, whether the crown has a right to issue a *levari facias* for the debt in question, and upon that point, it seems to me, on principle, there can be no doubt. Indeed, the question is not discussed on principle; it is not shown in any respect to be inconsistent with legal principle. The only thing that is said is, that this is a new mode of proceeding. * * * *

By the judgment, the debt becomes a debt to the King of record, and it is payable to the King *instantly*. To say that the crown shall not be at liberty to sue out an execution for its debt, is to place the crown in a worse situation than that in which the subject stands." The case of *The King vs. Woolf* was decided in 1819; that of *The King vs. Wade*, more than one hundred years before that time. In Virginia, the Court of Appeals, in *Pifer vs. The Commonwealth*, 14 Grattan Reports, 716, a case not involving directly this question, seem to consider it as an unquestionable right in the State. "The judgment in term is final; execution may have been issued and levied out of the property of the defendant," and also, "the judgment for the fine and costs would be final and execution could issue and be collected." To the same purport: See 8 Wend., 203; Bishop's Cr. Prac., sec. 870; Bac. Abr., vol. 4, 244.

We do not see any reason why this rule does not exist in Georgia, nor why the State should not be able to protect itself in enforcing its judgments against the necessity that might occur, either of discharging or supporting, for an indefinite period, an obstinate defendant.

Judgment affirmed.

Huff vs. Bournell.

JAMES B. HUFF, plaintiff in error, vs. LUCY J. BOURNELL,
defendant in error.

1. The rent of a house and lot wholly disconnected from the homestead is not one of the exceptions mentioned in the Act of 1869, for which the produce, rents or profits of the homestead is liable. (R.)
2. The term "necessaries," as used in said Act, refers to such necessities as have been furnished to the family in connection with the enjoyment of the homestead property, such as were necessary for them in the cultivation of the crops raised thereon, and for the support of the family whilst so doing. (R.)

Homestead. Necessaries. Before Judge HARRELL. Stewart
Superior Court. October Term, 1872.

For the facts of this case, see the decision.

E. G. RAIFORD, by brief, for plaintiff in error.

No appearance for defendant.

WARNER, Chief Justice.

The plaintiff held an execution against the defendant, Lucy J. Bournell, for the rent of a house and lot. The defendant was a widow, who had a homestead set apart to her for the benefit of herself and her minor children, on a tract of land with which the house and lot rented by her from the plaintiff in *fi. fa.* had no connection. The widow rented her homestead plantation to Ward, the garnishee, and the question in the case is, whether the rent due her for the use of her homestead from her tenant, is subject to the payment of the plaintiff's debt for the rent of a house and lot wholly disconnected with her homestead? The Act of 1869 declares that the produce, rents or profits of a homestead shall be exempt from levy and sale, except as provided for in the Constitution, and except for stock, provisions and other articles used in making the crop, necessities for the family, medical services, and tuition for education. The rent of a house and lot wholly disconnected from the homestead, is not one of the exceptions

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mentioned in the Act, but, it is said, it is included in the words "necessaries for the family." But we think the fair interpretation of these words, when taken in connection with the other words of the Act, and the obvious intention of that Act, is to confine them to such necessaries for the family as may have been furnished in making the crop on the homestead. In other words, the necessaries for the family must have been furnished them in connection with the enjoyment of the homestead property, such as was necessary for the family in the cultivation of the crops raised thereon, and for the support of the family whilst doing so, to enable them to enjoy the benefit thereof. A contract for the rent of a house and lot having no connection with the homestead property whatever, is not, in our judgment, within the purview of the Act, or in accordance with the true intent and meaning thereof, the more especially as it does not appear that it was necessaries for the family.

Let the judgment of the Court below be affirmed.

AMANDA BAZEMORE, plaintiff in error, vs. MARTHA DAVIS,
defendant in error.

1. Where land was held in trust to A for life, and at her death, to her children, and the trustee sold and made a deed, as trustee, to the whole estate, A, the life tenant, entering on the deed a written consent to the making of the deed:

Held, That this sale by the trustee and consent by the life tenant was not such an act by the tenant for life as, at common law, amounted to a forfeiture, and it was error in the Court to hold that, on the making of such a deed, a right of action, based on the forfeiture, accrued to the remainderman, and that the statute of limitations commenced to run.

2. Material error having been committed by the Court, a new trial will only be refused where the evidence *demand*ed the verdict which was rendered. (R.)

Trusts. Life estate. Forfeiture. Statute of limitations.
Before Judge COLE. Bibb Superior Court. April Term,
1872.

Bazemore vs. Davis.

On October 26th, 1869, Amanda Bazemore brought complaint against Martha Davis for lot of land lying and being in the city of Macon, known as part of lot number six, in the Southwestern survey of said city, including encroachment on Oglethorpe street, fronting on said street eighty-two feet, and running back one hundred and seventy-six feet, containing one-half acre, more or less; also, for *mesne* profits from January 16th, 1865, of the yearly value of \$500. The defendant pleaded title in herself, statute of limitations and title by prescription.

The evidence made the following case: On July 21st, 1842, William H. Disharoon conveyed to James S. Miller, as trustee for his wife, Sarah Disharoon, certain lands and negroes, to be held for the use of said Sarah during her natural life, with remainder to such children as she may bear to the grantor. This property was sold under an order of Court, and a portion of the proceeds invested in the lot in dispute. On December 10th, 1851, Peyton Reynolds, who had then become trustee for Sarah Disharoon, at that time Sarah Page, she, on the death of her former husband, having intermarried with Henry B. Page, conveyed the premises in controversy, by an absolute deed, to Job Taylor. To this instrument was annexed the signature of Sarah Page, as follows:

“GEORGIA—BIBB COUNTY.

“I, Sarah Page, hereby consent and agree to the making, executing and delivery of the above and foregoing deed, freely, willingly and of my own accord, and hereto set my hand and seal. This tenth day of December, 1851.

(Signed) “SARAH^{her} ✕ PAGE, [L. s.]
mark.

“In presence of

(Signed) “BENJAMIN RUTHERFORD,
“KEELIN COOK, J. I. C.”

Sarah Page died on October 6th, 1869, leaving the plaintiff as her only surviving child. The plaintiff sues as remain-

derman under the provisions of the trust deed executed by her father. The defendant holds under the deed executed by Peyton Reynolds to Job Taylor.

The jury returned a verdict for the defendant. Whereupon the plaintiff moved for a new trial upon the following ground, amongst others, to-wit: Because the Court erred in charging the jury as follows: "I charge you further, that if the trustee, with the written consent of the life tenant, sold the *corpus* of the estate, it worked a forfeiture of the life estate, and the remainderman was bound to bring suit within seven years."

The motion was overruled, and plaintiff excepted.

A. O. BACON; T. J. SIMMONS; JEMISON & NISBET; LYON & IRVIN, for plaintiff in error.

LANIER & ANDERSON, for defendant.

MCCAY, Judge.

1. If the charge of the Court to the jury in this case was error the plaintiff is entitled to a new trial. Under that charge the jury was bound under the facts, to find for the defendant on the plea of the statute of limitations. The question of acquiescence was not open to the consideration of the jury. We think the charge of the Court error. We will not go into a discussion of the question as to whether the statute begins to run on the marriage of a female minor to a man of full age, though the case in 14 *Georgia*, 687, would seem to be very decisive on that point. The error we find in the charge is, however, upon a different point. We think the Court erred in holding that the deed of the trustee to Taylor, consented to by the wife, was a forfeiture of the life-interest, and that the statute of limitations commenced to run against the remaindermen as soon as Taylor or his grantees took possession. If the deed to Taylor was by Reynolds, as trustee for Mrs. Page and *family*, as the record before us has it, then the first ingredient of an act of forfeiture did not exist, to-wit: the assertion of title to and sale of the whole interest *as the prop-*

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erty of the wife. The deed would not upon its face purport to convey the whole as *her property*. This, the assertion of title to and conveyance of the *whole*, is the very essence of the forfeiture. Forfeiture is a penalty for a breach of confidence. At common law, land passed by livery of seizin, delivery of possession. This the tenant for life had, and however his title might be limited, it was *prima facie* absolute. The grantor, by giving him the possession, had confided in him, and when, by virtue of this position, he gave livery of seizin of the whole, he was guilty of a breach of faith and forfeiture, even of what was his, was the penalty. So decidedly was this idea impressed upon the doctrine in England, that there grew up the distinction of tortious and innocent conveyances by tenant for life. The former being such as involved livery of seizin, and the latter not. And there are decisions that deeds operating by notice of the statute of uses, to-wit: deeds of bargain and sale, deeds of lease and release, etc., though they convey the whole estate, wanting as they do this element of livery of seizin, do not create a forfeiture. But this doctrine of forfeiture has never been applied to trust estates. Creatures as they are of Courts of equity which do not favor forfeitures, the *cestui que trust* has never been held to have such a position as life tenant as to make a conveyance a breach of fealty. The trustee has the whole legal estate. If there be a breach of confidence or fealty, it is by him, and he represents the remainderman as well as the tenant for life: *Lady Whetstone vs. St. Bary*, 2 P. Williams, 146; 3 Atkins, 728.

In the case at bar, treating the forfeiture as a penalty, is it not rather far fetched to say that the *consent* of the life tenant, that the trustee may sell the whole, is an *assertion* of title by her in the whole? Can it be fairly said to be anything more than a consent that, as far as she is concerned—that is, so far as her interests go—he may sell? The legal title to the whole is in the trustee. If there is a wrong done, it is by him, and we think it very harsh to transfer the old feudal penalty for an *act of the tenant* for life to a consent of that tenant to an

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act of another. As the other grounds of error in this case depend upon this, we do not go into them.

2. As we have said, the charge of the Court on the subject of the statute of limitations left the jury no discretion, and as we have no reason to suppose they passed upon the question of acquiescence, we do not inquire if the verdict may be sustained on that ground. We do not think the evidence *demand*ed a verdict for the defendant, and it is only in such cases that this Court refuses a new trial, if there be serious error by the Judge.

Judgment reversed.

JASPER N. SMITH, administrator, plaintiff in error, vs. WILLIAM MALCOLM, defendant in error.

In an application for an injunction to restrain a defendant from selling certain land, on account of fraud on the part of defendant in obtaining the title, the bill also praying relief and for the cancellation of the deed, and it does not appear that the defendant is insolvent, or threatening or offering to sell the land, and the evidence at the hearing on said application being conflicting as to the fraud, and the Chancellor refuses the injunction, this Court will not interfere with the decision of the Judge, the more especially as it does not appear that any irreparable damage can ensue to complainant from said refusal. If, whilst the suit is pending, the defendant were to sell the land, the complainant would only have to make the purchaser a party.

Injunction. Fraud. Notice. *Lis pendens*. Before Judge BUCHANAN. Meriwether county. At Chambers. May 15th, 1873.

Jasper N. Smith, as administrator *de bonis non cum testamento annexo* upon the estate of John Malcolm, deceased, filed his bill against William Malcom, making, substantially, the following case:

Defendant was the sole surviving executor of the will of deceased, and was in possession, as such, of the entire estate. In the year 1869, the legatees under said will, including com-

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plainant, commenced proceedings against defendant to remove him from the office of executor on account of mismanagement and waste. At the October term, of that year, of the Court of Ordinary of Walton county, judgment was rendered against the defendant, requiring him to give good and sufficient security for the faithful discharge of the trust, from which decision he appealed. Pending the appeal, the defendant made propositions of compromise to complainant to the effect that if the legatees under the will of John Malcom, deceased, would convey to him certain lands in Meriwether county, he would withdraw his appeal, resign the office of executor, recommend the appointment of complainant as administrator *de bonis*, etc., and turn over to him the entire estate. Complainant persuaded the other legatees to accede to these terms, and to give to him a power-of-attorney to execute the deed desired by the defendant. Possessed of this instrument, he went to Meriwether county to consummate the settlement. Upon defendant's turning over the property, etc., of the estate to complainant, he discovered that the grants, plats and deeds to certain valuable lands in Campbell county were missing. Upon demanding them of defendant, he stated that in the hurry of leaving home he had overlooked them. Complainant declined to make the deed to the Meriwether lands until they were produced. The settlement was apparently impossible under these circumstances, when defendant suggested that he would give to complainant an instrument stating that the Campbell county lands were undisposed of and still the property of the estate. The following instrument was accordingly drawn and delivered to complainant:

‘GEORGIA—MERIWETHER COUNTY.

“This agreement, between J. N. Smith and William Malcoln, is that the Campbell county lands are to remain untouched by the said J. N. Smith, or whoever is appointed to settle the estate of John Malcoln, deceased, until all the other lands are disposed of, then, if it can be made so as for William Malcom to get or become owner of said lands by distri-

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bution or otherwise, that is agreeable with the heirs of said estate.

(Signed)

“WILLIAM MALCOLM,
“J. N. SMITH.”

Under this instrument and the repeated verbal assurances of said defendant that said Campbell county lands were undisposed of and still belonged to said estate, complainant conveyed the Meriwether county lands to him.

After the settlement had progressed as far as the appointment of complainant as administrator *de bonis*, etc., to-wit: in the year 1871, he advertised said Campbell county lands for sale, when to his astonishment, he discovered that they had been conveyed to John W. Beck, by the defendant, as executor, on August 21st, 1869, for the price of \$6,000 00, \$2,500 00 of which had been before that time paid to him, of which no return had been made. Complainant waives discovery and prays that the aforesaid deed to the lands in Meriwether county be ordered to be delivered up, and that defendant, in the mean time, be enjoined from disposing of them; that the writ of subpoena may issue.

The answer of the defendant denied every material allegation in the complainant's bill, and alleged that at the interview in Meriwether county, defendant expressly told complainant that he had sold the Campbell county lands, and that he claimed he had the right to retain the notes given for the purchase money, to reimburse himself for what was due to him from said estate; that this issue was compromised by allowing the defendant to retain said notes for the purpose aforesaid, subject to a future settlement after all the other lands of said estate were disposed of; that this was the intention and meaning of the agreement set forth in the bill; that subsequently the complainant proposed that if the defendant would turn over to him the notes for the balance of the purchase money, he would compromise and settle all claims against the defendant on account of said lands, and although he believed the entire amount remaining unpaid was due to him upon a fair settlement, yet, to avoid trouble, vexation and litigation,

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he consented, and accordingly turned over to the complainant the aforesaid notes.

Conflicting affidavits, in support respectively of the bill and answer, were read on the hearing of the motion for injunction.

The injunction was refused and the complainant excepted.

WRIGHT, DENT & WRIGHT; J. H. S. BROBSTON, for plaintiff in error.

GEORGE L. PEAUVY, for the defendant.

TRIPPE, Judge.

This case presents no reason to make it an exception to the rule of non-interference with the discretion of the Chancellor in refusing an injunction, unless there has been an abuse of that discretion.

No special cause is shown for an injunction—no threat or offer by defendant to sell the land—no insolvency on his part, and the fraud charged, though strongly supported by affidavits, is strongly denied in the answer and in the affidavits offered by defendant. The bill calls for the delivery and cancellation of the deed, is filed in the county where the land lies and defendant lives, and the only danger complainant can apprehend is that the defendant may sell the land, and the consequent necessity of making the purchaser a party. He does not show that there is any reason to fear this. The protection that the doctrine of *lis pendens* gives him against final loss of title, by its going into an innocent purchaser, and the fact that defendant's solvency will protect him in any claim for rents, issues and profits, if such a sale were made, render it unnecessary, unless special reasons are shown, for an interference by the harsh writ of injunction.

Judgment affirmed.

ELBERT W. BAYNES, plaintiff in error, vs. JOEL A. BILLUPS,
administrator, defendant in error.

1. It is the province and duty of the Court to control the entries on its own docket, and if incorrectly made, to have the same corrected. (R.)
2. The defendant is not concluded on the trial of a case by the action of the Court in reinstating it on the docket, from pleading and proving an alleged agreement and settlement, and that it was to be dismissed in pursuance of the alleged agreement, and that the entry of dismissal was in fact made in accordance with such contract. (R.)

Practice in the Superior Court. Docket. Settlement.
Before Judge ROBINSON. Jasper Superior Court. August
Term, 1872.

For the facts of this case, see the decision.

G. T. & C. L. BARTLETT, for plaintiff in error.

J. A. BILLUPS, by N. J. HAMMOND, for defendant.

WARNER, Chief Justice.

In this case there was an entry made on the bench docket of the Superior Court in the handwriting of the presiding Judge opposite the case, "Dismissed by order of plaintiff's attorney, October term, 1870," and also, the following entry thereon, "Received the clerk's cost in the opposite case," signed by the clerk of the Court. At the August term of the Court, 1872, the plaintiff's attorney made a motion to set aside said entry of dismissal on the docket, on the ground that it was an error and unauthorized. The defendant in the case objected, and made a motion to enter a judgment of dismissal by order of plaintiff's attorney on the minutes of the Court *nunc pro tunc*, which the Court refused and the defendant excepted. The defendant then tendered an issue denying that said entry of dismissal was an error and unauthorized, but that the same was made under an agreement and understanding between the defendant, plaintiff and plaintiff's attorney, that if defendant would pay the sum of \$2,700 00 on the notes sued on it should

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operate as a payment and settlement of the whole debt of \$5,400 00, and that said case should be dismissed. The Court refused to allow the issue tendered to be tried by a jury and the defendant excepted. The Court examined the witnesses, holding that it was a question for the Court to decide whether the entry of dismissal was an error and made without authority, to which the defendant excepted. In our judgment, it was the province and duty of the Court to control the entries on its own docket, and if erroneously made to have the same corrected, which the Court did, by reinstating the case on the docket. But whilst we do not control the action of the Court in regulating the entries on its docket, it is not to be understood that the defendant is to be concluded on the trial of the case by the action of the Court in reinstating it on the docket, from pleading and proving the alleged agreement and settlement of the case, and that it was to be dismissed in pursuance of the alleged agreement, provided he can do so, and that the entry was in fact made on the docket in pursuance of that agreement between the parties.

Let the judgment of the Court below be affirmed.

WILLIAM D. ELAM, plaintiff in error, vs. H. J. JOHNSON,
Ordinary, defendant in error.

An attorney at law who was assigned by the Judge of the Superior Court as counsel to defend an indigent defendant, on his trial upon an indictment in the said Court, and who accordingly did appear and defend him, is not entitled by any law of this State to be paid for such services out of the county funds.

Attorney at law. Pauper. County funds. Before Judge HARVEY. Floyd Superior Court. January Adjourned Term, 1872.

William D. Elam petitioned the Superior Court for a rule nisi requiring H. J. Johnson, as Ordinary of the county of Floyd, to show cause why the writ of *mandamus* should not

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issue directing him to draw his draft on the county treasurer for the sum of \$150 00, alleged to be due to relator for professional services rendered to a pauper. The petition made substantially the following case: At the January adjourned term, 1871, of Floyd Superior Court, there came on to be heard the case of *The State vs. Reuben Taylor*, upon an indictment for simple larceny. Upon the statement of the prisoner that he had no counsel to defend him, was unable to employ one, and desired relator to represent his case, the Court appointed relator to conduct the defense. Relator performed the duties of counsel in said case upon the trial; the defendant being convicted, he moved for a new trial. The motion having been overruled, he made out a bill of exceptions and carried the case by writ of error to the Supreme Court, where the judgment was affirmed. Relator made out his bill against the county of Floyd for said professional services, amounting to \$150 00, and presented it to the Ordinary, requesting a draft upon the county treasurer for that sum. The Ordinary rejected the account and refused the draft.

The respondent demurred to the petition. The demurrer was sustained and relator excepted.

W. D. ELAM, by UNDERWOOD & ROWELL, for plaintiff in error.

ALEXANDER & WRIGHT, for defendant.

McCAY, Judge.

It is admitted that there is no specific authority granted by law to the Ordinary to pay this demand, that it is nowhere, in terms, made a charge against the county. If it can be paid at all, it is under paragraph 5 of section 547 of the Revised Code, "to pay the expenses of the county for bailiffs at Courts, non-resident witnesses in criminal cases, fuel, servant hire, stationery, and *the like*." But even, as to these expenses, the Ordinary can only pay such as are a legal charge against the county. Nor is it in the *discretion* of the Judge of the Supe-

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rior Court or the Ordinary to say what is included. This Court held in 24 *Georgia*, 82, that without a special law giving the authority, the Judge of the Superior Court could not charge the county with the expense of feeding jurymen, even whilst sitting in a case. At last, therefore, the inquiry is, whether in the nature of things, the demand now pressed is a charge on the county. Our constitutional provision, that a prisoner shall have "the privilege and benefit of counsel," is appealed to. Does this mean that the public shall *furnish* him with counsel? We think not. The provision is general. It applies to the rich as well as the poor. It does not say he shall have this if he is *unable* to procure counsel, but what it guarantees is to all, to-wit: the *right* to "have the privilege and benefit of counsel." In England, this right was, in many cases, denied, or only allowed to a limited extent. And this clause was to *secure* this right, even against legislative infringement. We do not think the public has taken upon itself *the duty* of seeing to it, that every prisoner has the benefit of counsel, except in a collateral way. We do not think a Judge of the Superior Court has the power to appoint a private citizen, not an admitted attorney, to any such duty; it is a duty growing out of the *office* of an attorney, or rather of counselor, or advocate. An "attorney at law" in this State, exercises all the functions of an attorney and counselor in England. His profession is recognized by law. He is a sworn officer; he is examined, licensed and commissioned, and has legal *duties* and privileges attached to his office. One of these is provided by our Code—"Never to reject, for considerations personal to himself, the cause of the defenseless or oppressed." This, too, is an old common law duty, and has been not only the admitted *obligation* but the pride and glory of the profession from time immemorial. The law recognizes the profession and the office. As it confers privileges, it also imposes duties. One of these is, that he will never reject the cause of the defenseless, and that when the presiding Judge of a Court (at which he is in attendance)—the head of his profession for the time—presents to his notice a case coming

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within the sphere of his obligation, he will, in good faith as a man and as a lawyer, come to his aid. If he fail, he fails in his *professional* obligations.

Thus far the law has provided for the defense of indigent persons charged with crime. The office of an attorney at law has this duty imposed upon it. It is one of the duties the members of our profession take upon themselves with that office.

Judgment affirmed.

SELMA, ROME AND DALTON RAILROAD COMPANY, plaintiff
in error, *vs.* J. G. TYSON, defendant in error.

1. A foreign corporation transacting business in this State, may be garnished for a debt it may owe anywhere in this State where suit for such debt could be brought.
2. The affidavit *in forma pauperis* allowed by section 3984 of the Code to be made by a party applying for a writ of *certiorari* cannot be made for him by his attorney at law.

Corporation. Garnishment. Affidavit. Before Judge HARVEY. Whitfield Superior Court. October Term, 1872.

Tyson sued out an attachment against A. D. Breed, returnable to the Justice Court for the eight hundred and seventy-second district, for \$25 00. Process of garnishment directed to the Selma, Rome and Dalton Railroad Company, was served on O. J. Cunningham, its agent at the city of Dalton. Judgment was obtained against the defendant. The garnishee, by its counsel, moved to be discharged on the grounds that it was a foreign corporation, and that its president did not reside in the State of Georgia. The motion was sustained. Whereupon Tyson carried the case by writ of *certiorari* to the Superior Court. When the case was called in the last mentioned tribunal, counsel for the garnishee moved to dismiss the writ of *certiorari* because the affidavit *in forma pauperis* was signed as follows: "J. G. Tyson, by his attorney, Joseph

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Glenn." The motion was overruled and the counsel for the garnishee excepted.

After argument upon the merits, the Court held that the Justice of the Peace erred in deciding that the service of the summons of garnishment on the agent of the Selma, Rome and Dalton Railroad Company at Dalton, was not a sufficient service upon the company, and sustained the *certiorari*. Whereupon counsel for the garnishee excepted.

Error is assigned upon each of the aforesaid rulings.

J. E. SHUMATE; PRINTUP & FOCHE, for plaintiff in error.

JOSEPH GLENN; J. A. GLENN, for defendant.

TRIPPE, Judge.

1. Is a foreign corporation liable to a summons of garnishment in this State? By section 3213 of the Code attachments may issue against such corporations "under the same rules and regulations as are by this Code prescribed in relation to issuing attachments and garnishment in other cases." Before the Code, in 5 *Georgia*, 531, this Court held that "the property of a foreign corporation, within the limits of this State is liable to be attached under our attachment laws." At this term of the Court, it was decided in the case of *E. W. Wilson vs. The Bank of Louisiana*, that a foreign corporation is liable to an attachment, which was levied by service of summons of garnishment. In 41 *Georgia*, 671, in speaking of the mode of service in suits against domestic corporations, this Court says: "Why should a foreign corporation not stand upon the same footing and be served in the same way? It locates an office here. It appoints an agent here. It makes contracts here, through that agent. In our judgment it may be made a defendant to a suit here and be served by serving its agent just as a Georgia corporation may."

Here then are authorities that a foreign corporation, whether or not it is doing business in this State, is liable to an attach-

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ment—that one doing business here may be sued and served as a Georgia corporation. Why, then, is it not liable to the garnishment laws? A garnishment is a suit. Its creditor can bring his action for the debt, and there can be no reason, in principle, why one to whom that creditor is indebted may not, by garnishment of the corporation, subject its creditor's claim to the payment of his debts. A Georgia corporation is not subject to garnishment in any county where suit could not be brought for the debt it is charged to owe. So it is with the foreign corporation. It is not liable to garnishment except where suit could be brought on the debt it is charged to owe: See *Clark vs. Chapman, etc.*, 45 Georgia, 486.

2. In the case of *Elder vs. Whitehead*, 25 Georgia, 262, it was decided that an attorney at law is not authorized to make the affidavit *in forma pauperis* to entitle a party to an appeal without paying costs or giving security. The same reason that controls in cases of appeals applies to a *certiorari*—the law does not allow it.

Judgment reversed.

TUNIS G. CAMPBELL, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. Where a Justice of the Peace is charged with false imprisonment under color of legal process, the warrant under which the arrest was made being set out in the indictment, he is not entitled to a continuance on account of the absence of a witness by whom he expects to prove a parol commitment of the person arrested for contempt of Court. (R.)
2. Where the juries for a term of the Court have been regularly drawn, the Court has no power to direct that they be purged, unless each juror came up to the standard of uprightness and intelligence established by him, to-wit: could read the Constitution of the United States, and the Constitution of the State of Georgia, and could write. (R.)
3. Where, upon the application of this test, eight colored and two white men were found deficient and excused from further service, and the sheriff was ordered to fill up the panels with jurors from the jury list who could come up to the standard established by the Court, a chal-

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lenge to the array, when the panel thus made was put upon the defendant, should have been sustained. (R.)

4. A Justice of the Peace indicted for false imprisonment under color of legal process, is not entitled to the right of appearance and being heard before the grand jury at the time the true bill is found. (R.)
5. The law does not presume malice against a judicial officer because he renders an illegal judgment, or because, in the discharge of his official functions, he does an illegal act. (R.)

Continuance. False imprisonment. Justice of the Peace. Juries. Malice. Presumption. Before Judge SCHLEY. McIntosh Superior Court. April Adjourned Term, 1872.

Tunis G. Campbell was placed on trial for the offense of false imprisonment under color of legal process, alleged to have been committed upon the person of one John M. Fisher. The indictment set out the warrant under which the imprisonment was charged to have been committed. When the case was called, the defendant moved for a continuance on account of the absence of one Remus Elliott, a material witness, who resided in the county, had been subpoenaed, was not absent by the procurement or consent of the defendant, directly or indirectly, and by whom he expected to prove that Fisher was committed to jail under a verbal order for contempt of Court, the motion setting forth the character of the contempt. The motion was overruled, and the defendant excepted.

All the remaining facts, necessary to an understanding of the case, are embraced in the decision.

W. B. GAULDEN; AMOS T. AKERMAN, by HILL & CONLEY, for plaintiff in error.

ALBERT R. LAMAR, Solicitor General, by A. B. SMITH, for the State.

WARNER, Chief Justice.

The defendant was indicted for the offense of false imprisonment, in that he issued a warrant of commitment as a Justice of the Peace, against one Fisher, who was alleged to have

been in contempt of the Justice Court in not paying the costs of a criminal prosecution which had been instituted in said Justice Court, and ordering the said Fisher to stand committed until said costs were paid, and who was committed to the common jail of the county under said order and warrant. On the trial the defendant, under the charge of the Court to the jury, was found guilty. Various exceptions were taken to the rulings of the Court in the progress of the trial, which are now assigned for error here.

1. The 4300th section of the Code declares, that "the arrest, confinement or detention of a person or citizen, by the warrant, mandate or process of a magistrate, being manifestly illegal, *and* showing malice and oppression, the said magistrate shall be removed from office; and each magistrate and all and every person or persons knowingly and maliciously concerned therein, shall be punished," etc. The motion for a continuance of the case was properly overruled, in view of the facts disclosed in the record.

2. When the panel of forty-eight jurors was put upon the defendant, he challenged the array on the ground that the jurors were not drawn according to law. This challenge to the array necessarily included the twenty-four jurors who had been empaneled by the Court, and who constituted a part of the panel of the forty-eight put upon the defendant. Were they drawn and organized according to law? It appears from the record, that on the 28th of February, 1872, the presiding Judge of the circuit passed an order appointing three commissioners to revise the jury-box of McIntosh county. It also appears that the jury-box for that county had been revised by the commissioners on the 13th of June, 1870, and that two years had not expired up to the time of the order of the Judge to revise it; but whether juries had been drawn for the April term of the Court as provided by the Act of 1869, the record does not inform us. But it does appear in the record that after revising the jury-box under the order of the Court, the commissioners, and the Ordinary with the clerk, did proceed to draw grand and petit jurors for the next approaching term

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of the April adjourned Court, on the fourteenth day of March, 1872. This, we presume, was done under the provisions of the third section of the Act of 1869. Whether that jury was legally drawn or not, we are unable to say from the confused and unsatisfactory statement of facts disclosed by the record. But conceding the juries were regularly and legally drawn, the next question that arises in the case, is as to the legal power and authority of the Court to purge that jury in the manner disclosed by the record, and to compel the defendant to select his jury from the twenty-four so purged, and composing a part of the panel of the forty-eight? It appears from the record that on the first day of the Court, and after the Court had been organized, a motion was made to have the jury purged to ascertain whether they were intelligent and upright jurors. The Court appointed a committee of three to take out and examine the juries, to see if they came up to the standard stated by the Court, to-wit: whether they could read the Constitution of the United States, and the Constitution of this State, and write. After the committee had privately examined the juries, they reported to the Court that there were eight colored men and two white men, who could not read and write according to the views of the Court. Whereupon the Court excused them from serving at that term of the Court, and ordered the sheriff to fill up the panels with jurors from the jury list who could come up to the standard as ruled by the Court, which was done. The twenty-four jurors thus purged by the order of the Court constituted a part of the panel of the forty-eight put upon the defendant, instead of those who had been selected by the Ordinary, clerk of the Superior Court, and the three commissioners, and drawn from the jury-box to serve as jurors for that term of the Court. The law gives to the officers specified in the Act of 1869, the power and authority to judge of and to select from the book of the receiver of tax returns "upright and intelligent persons" to serve as jurors, and not the Superior Court, or the Judge thereof.

3. The challenge to the array of the jurors put upon the defendant in this case was well taken, and should have been allowed by the Court, and it was error to compel him to select his jury therefrom. Ten of the jurors constituting the panel put upon the defendant were not selected and drawn according to law, for the reasons before stated, and that was a distinct ground of challenge made to them by the defendant.

4. The defendant was indicted under section 4300 of the Code for false imprisonment under color of legal process, as specified in that section; he was not indicted under section 4432 for malpractice in office as a Justice of the Peace, and, therefore, was not entitled to the right of appearing and being heard before the grand jury, when the bill of indictment was found against him.

5. The Court charged the jury, amongst other things: "If you find from the testimony and the warrant that it was manifestly illegal, the law presumes malice, as the law presumes every officer knows the law, and will act in conformity thereto in the issuing of any warrant, mandate or process." This charge of the Court, in view of the statute under which the defendant was indicted, was error. The warrant of commitment must not only have been manifestly illegal, but the arrest, confinement and detention of Fisher under it should have been shown to have been malicious and oppressive. The law does not presume malice against a judicial officer because he renders an illegal judgment, or because, in the discharge of his official functions, he does an illegal act; nor does the statute under which the defendant is indicted so contemplate. "The arrest, confinement and detention of a person by the warrant, mandate or process of a magistrate, being manifestly illegal *and* showing malice and oppression," are the words of the statute. The law does not presume malice against the magistrate from his mere illegal act in issuing the warrant of commitment, but that presumption may arise from his *conduct* when taken in connection therewith.

Let the judgment of the Court below be reversed.

Southern Express Company *vs.* Duffey.

SOUTHERN EXPRESS COMPANY, plaintiff in error, *vs.* ELIZABETH DUFFEY, defendant in error.

1. The statements of the local agents of an express company to the grantor, pending negotiations between said company and said grantor, for said company to release the grantor's son, who was under arrest for embezzlement, upon the execution of a deed conveying certain land to the company, are admissible upon the trial of an action of ejectment by the company for said land. (R.)
2. A mother made a deed to procure the release of her son from arrest on a charge of felony, to-wit: for embezzling money in his hands as the messenger of an express company. The expressed consideration of the contract was the repayment by her of the money embezzled by the son; but it was in proof that the son was under arrest and in chains, and the grantee in the deed agreed to release the son and stop the proceedings, though he expressly refused to settle the prosecution, saying he could not control the public authorities. The son was released, and the proceedings stopped:

Held, that the deed was illegal and void.

Deed. Consideration. Duress. Before Judge GREEN.
Spalding Superior Court. February Term, 1872.

The Southern Express Company brought complaint against Elizabeth Duffey for a lot of land situated in the city of Griffin, and for *mesne* profits from March 13th, 1869. To the declaration was annexed, as an abstract of title, a statement of a deed purporting to have been made by defendant on the 13th of March, 1869, conveying the premises in dispute to plaintiff.

The defendant pleaded that she was not in possession of any land in the city of Griffin, to which the plaintiff had a legal title; that the pretended deed under which the plaintiff claimed was obtained by duress, fraud and misrepresentations; that said deed was executed for no consideration; that it was made for the purpose of compromising a felony; that plaintiff, under its charter, was not authorized to hold real estate.

The evidence made the following case:

In April 1866, W. J. Duffey, the son of the defendant, was in the employ of plaintiff as messenger on the Macon & Western Railroad. Whilst acting in this capacity, he appropri-

ated to his own use moneys intrusted to his care to be delivered at Atlanta and Macon, Georgia, to the amount of \$1,766 30, which sum the plaintiff was compelled to pay. He escaped to Texas, but was brought back to Atlanta by the superintendent of the southern division of plaintiff, under a requisition from the Governor of Georgia upon the Governor of Texas. He arrived at Atlanta in irons. After his arrest in Texas, propositions were made by the officers and agents of plaintiff to the defendant, that if she would pay the amount of money he had appropriated, he should be released, stating, at the same time, that they could not, under the law, settle the criminal prosecution, as that matter would have to be left to the civil authorities. These negotiations were pending for some six weeks. W. J. Duffey was arrested in February, 1869. At length, on March 13th, 1869, the defendant executed to the plaintiff a deed to the premises in dispute, purporting to have been made in consideration of \$2,126 94, the principal and interest due to plaintiff by her son. Plaintiff gave to defendant a receipt in full for said indebtedness. W. J. Duffey was then released.

The jury returned a verdict in favor of the defendant. Whereupon the plaintiff moved for a new trial upon the following grounds:

1st. Because the Court erred in charging the jury as follows: "That if you believe from the evidence that the agents of the company went to Mrs. Duffey and told her that W. J. Duffey was in the power of the company, and that they could send him to the penitentiary, and by doing so, so overwhelmed her as to put her in duress, so as to prevent her free and voluntary action in the making of the deed, and the plaintiff afterwards took advantage of this, and received a benefit by it in the making of this deed, then the same is void, and the plaintiff is not entitled to recover."

2d. Because the Court erred in the following charge: "That if Mrs. Duffey made this deed understanding it to be for the purpose of procuring the release of her son, W. J. Duffey, and the other party had reason to believe she so understood it, the deed is void."

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3d. Because the Court erred in the following charge: "Duress consists in any illegal imprisonment, or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will," the same being inapplicable to the case; and in the same connection, in charging as follows: "That duress might exist when the free will of the party is restrained, or her consent induced by threats or other acts. That if such were the facts in the case, the deed procured under such a state of facts was void."

The motion for a new trial was overruled and the plaintiff excepted upon each of the aforesaid grounds.

PEEPLES & STEWART; E. W. BECK, for plaintiff in error.

E. W. HAMMOND; BOYNTON & DISMUKE, for defendant in error.

1st. Charge of Court on duress not error: Code, sections 2595, 2710, 2714.

2d. Deed void: Sections 2999, 2703, 2707; 39 Ga. R., 85.

3d. Verdict is right; no necessity for a new trial: 10 Ga. R., 429; 14 *Ibid.*, 153; 15 *Ibid.*, 155; 16 *Ibid.*, 368; 30 *Ibid.*, 278, 958. Judicial discretion not abused.

MCCAY, Judge.

1. There is really but one point in this case. The admission of the statements of the two minor local agents of the company, even if not authorized by law, was immaterial, as the case is, in our judgment, with the defendant below, even on the evidence of the plaintiff. Nor were these statements improperly admitted. They were a part of the negotiations and communications between Mrs. Duffey and the principal authorized superintendent, and the whole transaction could not have been fairly before the Court with these statements left out. They were referred to in the talk between the superintendent and Mrs. Duffey's agent, and are fairly a part of the *res gestæ*. They are, besides, very unimportant, since they

are, in the main, only appeals to her, based on facts and consequences known to all, and only show what all the other testimony shows, that Mrs. Duffey *acted* on the idea that she was releasing her son.

2. The main point in the case, is whether, according to the evidence, the making of this deed, was an act coming within that section of our Revised Code, section 2999, which provides, that "whilst a party injured may lawfully receive pay for the damage he has received from a crime, and may make a contract therefor, yet if *any attempt* is made to satisfy the public offense or to suppress a prosecution therefor, it vitiates the entire agreement." Jeff. Duffey was under arrest, was in Atlanta, brought back from Texas under a requisition from the Governor, and *was in chains*; such is the testimony. If he was under legal arrest, then it is clear to us, and the idea is fairly supported by the authorities, that the agreement to release him, to stop the *then* proceedings, was within the statute: Section 2999 of the Code. Indeed, we do not see how the parties could agree to any thing else that would go to satisfy the public offense. They *could not prevent* a new proceeding; anybody could sue out the warrant, if he had the evidence, and if the custody of Jeff. was legal, the agent of the express company agreed to do more than he could have done if the officers of the law had done their duty. If the agreement to release a man under arrest and stop that proceeding is not an attempt to suppress a prosecution, we are at a loss to put a state of facts that does make a case within the rule. If this arrest was illegal, if the agents of the express company had this boy in their own custody, and could let him go or not at their pleasure, then this deed was the clear result of duress, since it was made to release the *child* of the grantor from illegal imprisonment. A man's child stands, under the law, in the same situation as himself in such cases.

Altogether we think this deed void in every aspect of the evidence, and we affirm the judgment.

Judgment affirmed.

Grimes vs. Jones.

HUMPHREY GRIMES, plaintiff in error, vs. P. B. & J. F. JONES, defendants in error.

1. Where a writ of *certiorari* has been granted, and the Court dismisses the same on the ground of non-compliance by the petitioner with some requisition of the statute, and plaintiff in *certiorari* makes application within three months from said dismissal for another writ, he is not barred by lapse of time, from having his second application heard: 32 Ga. R., 487.
2. The facts set forth in the application for the writ of *certiorari* in this case entitles the plaintiff to the granting of the writ.

Certiorari. Statute of limitations. Before Judge HARRELL. Early County. At Chambers. July 1st, 1872.

Humphrey Grimes petitioned for the writ of *certiorari* in the case of P. B. & J. F. Jones, against petitioner, tried in the Justice Court of the eight hundred and sixty-sixth district. The petition was sanctioned and the writ issued. On the 6th day of April, 1872, during the regular term of the Superior Court of the county of Early, said writ was dismissed upon the ground that no affidavit *in forma pauperis* had been filed.

On July 1st, 1872, a second petition for the writ of *certiorari* was presented to the Judge of the Pataula Circuit, which was a copy of that which had been dismissed.

The petition made the following case:

P. B. & J. F. Jones brought suit against petitioner on an account for \$32 31, headed as follows:

“Humphrey Grimes,
1870. With Buchannon & Flemming.”

Petitioner demurred to the suit on the ground that P. B. & J. F. Jones were not proper parties to the suit. The demurrer was overruled and petitioner excepted. Petitioner pleaded the general issue and a set-off. Plaintiffs tendered in evidence the books of account of Buchannon & Flemming. Petitioner objected to their introduction. The objection was overruled and petitioner excepted.

..... Flemming was introduced to prove the correctness of

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the items charged in the account. Upon his stating that he kept a clerk who was within the jurisdiction of the Court, petitioner objected to his testifying as to the correctness of the account. The objection was overruled and petitioner excepted. "Flemming stated that he made the entries on his day book, which was a transcript from other books," which were not produced. Petitioner again objected to the testimony. The objection was overruled and petitioner excepted. Witness then testified then he did not know that any of the goods charged to P. B. & J. F. Jones were sold or delivered to petitioner. That his clerk, Frank Jones, reported the amount through his books; that witness had never had any understanding with petitioner about P. B. & J. F. Jones paying his account; that P. B. Jones settled the account of petitioner made at the store of Buchannon & Flemming; and witness wrote a receipt to Jones for three hundred and eighty-one pounds of cotton, received of Bill and Henry Grimes, minor children of petitioner, of the value of \$53 57.

The receipt above referred to was introduced.

Frank Jones testified that he was the clerk of Buchannon & Flemming, and sold goods to petitioner in the year 1870; that he could not say whether the items charged on the books before him were the same or not, as he did not make the entries; that he could not say what goods were sold to petitioner unless he had his books on which he made his original entries; that the goods sold to petitioner were charged to P. B. & J. F. Jones, by agreement between P. B. Jones and witness; that petitioner did not authorize it; that he had had no conversation with petitioner about it.

Plaintiffs closed.

The defendant moved for a non-suit. The motion was overruled, and the defendant excepted.

Humphrey Grimes, the petitioner, testified, that at the commencement of the year 1870 he made a verbal contract with P. B. Jones to let him have two of his minor children, Henry and Bill, to work for P. B. & J. F. Jones; that they were to furnish two mules, find the children, and half they made was

to be paid to petitioner; that they made a crop amounting to three hundred and eighty-one pounds of cotton, of the value of \$53 57, one hundred and seventy-five bushels of oats, of the value of \$5 00; that instead of complying with his contract and turning over the crop to petitioner, he carried the cotton to Buchannon & Flemming and sold it to them without petitioner's knowledge or consent, and that he has never been accounted with for the same; that petitioner never authorized P. B. Jones to settle any accounts of his with Buchannon & Flemming, or with any one else; that when he learned that Jones had paid his account, he told Frank Jones, the clerk, that P. B. Jones had no right to interfere with his business.

P. B. Jones, in rebuttal, testified that he received the cotton, and that he had given the children of petitioner an order to the store for oats.

The Justice rendered a judgment for the plaintiffs for the amount of the account sued on, and defendant excepted.

The trial was had on December 8th, 1871.

The Judge refused to sanction the petition and petitioner excepted.

THOMAS K. APPLING, by JACKSON & CLARKE, for plaintiff in error.

No appearance for defendants.

TRIPPE, Judge.

1. The second application for the writ of *certiorari* was made within three months from the time the first writ was dismissed, but not within three months from the decision of the Justice complained of. By the law in force in 1861, the writ of *certiorari* could be sued out within six months from the time of the decision complained of. Under that law, this Court held in *Hendrix vs. Kellogg*, 32 Georgia, 436, that where such a writ is dismissed or non-suited, etc., the plaintiff may renew his application within six months from such dismissal,

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non-suit, etc. This decision was made by virtue of the construction given to the 23d section of the statute of limitations of 6th March, 1856, allowing suits which had been dismissed to be renewed within six months where they would otherwise be barred by the statute. Section 2881 of the Code preserves the same right to the plaintiff in this case which was held to be his under the Act of 1856.

2. From the facts set forth in the application for the *certiorari* we think the petitioner was entitled to a hearing on the merits and to a decision by the Judge as to whether he should have a new trial in the Justice Court, or to such a judgment as from the answer of the Justice and the facts of the case the Judge should be authorized to render.

Judgment reversed.

SUSAN A. CLINCH *et al.*, plaintiffs in error, vs. FERRIL & WESLOW *et al.*, defendants in error.

1. An indebtedness to authorize a sale of a trust estate must have been contracted for articles, or property, or money furnished for the use and benefit of the trust estate. (R.)
2. An execution based upon a judgment against trustees which fails to specify the property to be bound for its payment, having been levied upon the trust estate the sale will be enjoined. (R.)
3. Where suit is instituted against trustees for advances alleged to have been made to one of the *cestui que trusts* with the assent of the defendants, for the use of the trust estate, and a general judgment is taken against the trustees, and the execution based thereon is levied upon the trust estate, the *cestui que trusts* not being parties to the execution, could not file an affidavit of illegality. (R.)

Trusts. Judgment. Injunction. Illegality. Before Judge SESSIONS. Camden Superior Court. April Term, 1872.

For the facts of this case, see the decision.

SMITH & MERSHON; HARRIS & DAVENPORT, by LESTER & THOMPSON, for plaintiffs in error.

Clinch *et al.* vs. Ferril & Weslow.

A. J. BESSENT; J. C. NICHOLS, by Z. D. HARRISON, for defendants.

WARNER, Chief Justice.

This was a bill filed by the complainants against the defendants praying for an injunction to restrain the sale of the *corpus* of certain trust property set forth in the bill. The presiding Judge refused to grant the injunction and the complainants excepted. It appears in the record, that Hopkins devised certain lands to Bessent and Long in trust for the use of his daughter, Susan, during her life, and after her death to and for the use and benefit of the issue of her body. Susan intermarried with Clinch and has five minor children who, with their mother, are the complainants. It also appears that Ferril & Weslow, in the year 1869, instituted suit in the Superior Court of Camden county against the trustees of Mrs. Clinch for the sum of \$1,748 86, alleged to have been for advances made by them to Mrs. Clinch, one of the *cestui que trusts*, with the assent of the defendants, for the use of the plantation belonging to her, and for the support of her children and for the purchase of work animals employed in the cultivation of said plantation. On the 11th November, 1869, a general judgment was entered up against the defendants for the sum sued for with interest and costs, without specifying in the judgment *the property* out of which the money was to be made. An execution has been issued on that judgment and levied by the sheriff on the "Incoochee plantation," which is a part of the trust estate. The execution is not set forth in the record, but we presume that it follows the judgment. The object of the complainants' bill is to restrain the sale of the *corpus* of the trust estate under the execution issued upon this general judgment obtained against the trustees. The claim of the plaintiffs to authorize a sale of the trust estate, must have been for articles or property or money furnished for the use of *the trust estate* and the judgment should have specified the trust property to be bound for the payment of

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it, so that the execution might have followed the judgment in that respect. The *cestui que trusts* were not parties defendants to the execution, and could not have filed an affidavit of illegality. Making advances for the use and benefit of a *trust estate*, is one thing, making advances for the use and benefit of those who are enjoying or cultivating a trust estate, is quite a different matter, which those who make advances will do well to remember. See *Satterwhite vs. Beall, Stewart & Ansley*, 28th Georgia Reports, 525. In view of the facts alleged in the complainants' bill, it was error in the presiding Judge in not granting the injunction prayed for.

Let the judgment of the Court below be reversed.

AUGUSTUS R. WRIGHT *et al.*, plaintiffs in error, vs. G. W. NAGLE *et al.*, defendants in error.

Under the Act of December 5th, 1805, granting to the Inferior Courts of the several counties of this State, jurisdiction to authorize the establishment of bridges and ferries, etc., it was not within the powers of the Inferior Court of Floyd county to grant to any person the exclusive right to build and establish bridges upon the Coosa and Etowah rivers for three miles from the junction of said rivers in said county, nor had the said Court or its successor, the Ordinary, under any law passed since 1805, any such authority, and the order of the Inferior Court granting the exclusive privilege contended for, is without authority and void.

Injunction. Inferior Court. Contract. Roads and bridges. Before Judge HARVEY. Floyd county. At Chambers. December 11th, 1872.

Augustus R. Wright and Alfred Shorter filed their bill against G. W. Nagle, Daniel Adams, Hines Smith, as trustee for his wife, and Hugh D. Cothran, containing the following allegations: Some time in the latter part of the year 1850, or the beginning of the year 1851, Alfred Shorter, H. V. M. Miller and Lewis Tumlin, supposing that they

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were the owners and proprietors, exclusively, both by the right of prescription and also by contract with the Inferior Court of Floyd county, to all ferry and bridge privileges on the rivers Etowah and Oostanaula and Coosa in and about the city of Rome, and the charging of toll for transportation on the same, and the Inferior Court of the county aforesaid, essaying to build and have constructed certain other bridges in and about said city, materially damaging said privileges, franchises and contracts, filed their bill of injunction to restrain the building of the same. The said case came on for a hearing before Judge John H. Lumpkin, on the 12th day of April, 1851, and the injunction was refused by him. From this decision an appeal was had by the complainants to the Supreme Court of said State, and the decision below was affirmed, the Supreme Court deciding and holding that said complainants had a good and valid title to said ferry and bridge franchises and privileges, but that the same was not *exclusive*, and the Inferior Court did have the right to build other bridges and establish other ferries. In the meantime the said Inferior Court had involved itself in contracts for the building of other bridges. These complainants beg leave to refer to the said case and the decision as often as may be necessary for either party, and have not attached a copy of the same because it would greatly increase the record. It is found in 9th Georgia Reports, page 517. They further decided, and it thereby became the law as expounded by the highest tribunal of the State, that if an exclusive grant was intended by the Inferior Court, it ought to have been and must be contained in their contract.

The Inferior Court having involved itself in liabilities upon contracts for the building, as aforesaid, of other bridges, and especially with one William R. Smith, to be built at Smith's ferry, on a bluff of lime rock at the upper end of town, across the Etowah, amounting to several thousand dollars, and one at the foot of bridge street in front of the Court-house; a large part of the funds which had been subscribed ailing to be paid, and in view of said decision, and with ex-

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press reference to the same, made certain propositions to Dr. H. V. M. Miller as one of said bridge company, and representative of the same, offering, on certain conditions, to grant power to said company, and their heirs and assigns, all bridge and ferry privileges about the city on said rivers for three miles from the junction at the head of Coosa river, and to give to them the exclusive use and control of the same forever, and forever debarred themselves and their successors from establishing any other bridges, or roads, in anywise affecting or injuring their privileges, a copy of which said agreement is hereto appended marked exhibit, Number 1, and which with the order extending the time for the execution, is also recorded on the minutes of said Inferior Court. It is as follows:

EXHIBIT NO. 1.

“FLOYD INFERIOR COURT AT A CALLED TERM, JULY, 1851.

“By an order of the Inferior Court heretofore passed, subscribing the sum of \$500 00, to be appropriated to the erecting of free bridges across the two rivers, to-wit: the Etowah and Oostanaula; and in order more effectually to carry out said object, said Court appointed a committee of five to take up private subscriptions, and to contract for the building of said free bridges upon the faith of the said several sums subscribed; and in conformity with said order, said committee proceeded to take up subscriptions for the aforesaid purpose, and thereupon entered into a contract for building a bridge across the Etowah river; and after every effort being made on the part of said committee, which has been made known to said Inferior Court, by the petition of said committee for relief, setting forth in said petition that they could not raise money, that those having subscribed for said purpose, on being called on, have refused or failed to pay, and which failure or refusal is likely to inure to the great damage of said committee in the erection of said bridge, therefore they ask of said Court to make some arrangement by which they, the said committee, may be released from heavy expense now thrown upon them by reason of the failure of the citizens of Floyd county to subscribe and pay to said committee. Upon the aforesaid

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facts being made known, in order more effectually to relieve said committee, it is ordered by the Court that the following contract be offered to H. V. M. Miller, one of the original bridge company; that for and in consideration of the large reduction in tolls to said county, and the removal of the new bridge across the Oostanaula up to the foot of Court-house street, it being the place at which the original bridge on said river was located, or the erection of a new bridge at said place, to be built or removed during the present summer or fall, and then the present bridge to be closed up; and the further consideration of the relief of the first aforesaid committee and Court from all the expenses they have in anywise incurred in erecting the half part of the new bridge now being built at the rock bluff on the Etowah river by one William R. Smith and the committee as aforesaid, and that said bridge shall be completed, provided nothing is hereby done to destroy the remaining half interest of said bridge belonging to said William R. Smith, according to the contract as entered into between the said Smith and Inferior Court, as changed and altered on the 27th day of May, 1851; and for and in consideration of said several causes moving, it is agreed and ordered by said Inferior Court, that franchises and privileges of opening ferries and building bridges, receiving and collecting tolls on the Oostanaula at or near the city of Rome, county of Floyd, be, and the same is hereby vested in and secured to the said H. V. M. Miller, his heirs and assigns forever, and that the franchise and privileges of opening ferries and building bridges, receiving and collecting tolls on the Etowah river at or near the city of Rome, be, and the same is hereby vested in, and secured to said Miller, his heirs and assigns forever, and that the said franchises and privileges on the aforesaid rivers and the Coosa extend three miles from said junction every way, provided the same does not interfere with rights heretofore vested; and the half interest in said bridge, as first aforesaid, is hereby secured to the said H. V. M. Miller, his heirs and assigns in as full and complete a manner as by law can be transferred by said Court to said

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Miller, so far as the same is not vested in the said William R. Smith, his heirs and assigns, as set forth in said mentioned contract with said Smith, bearing date the 27th day of May, 1851. And the said H. V. M. Miller binds himself, his heirs and assigns, to keep in good repair the bridges, to-wit: the one at the point designated, as aforesaid, across the Oostan-aula, and one across the Etowah at the foot of Broad street, at the city of Rome, county of Floyd, in good repair for the trading public generally; and the tolls and privileges to be equally extended to the citizens of said county of Floyd, at each of the respective bridges, according to the basis of tolls agreed upon by said Court.

“The franchises and privileges heretofore and at present being in an unsettled state, causing much litigation and trouble to all parties, for the relief of which, and the aforementioned considerations, this charter or contract is set forth to more fully define and secure to all parties their rights; and any omission in detail shall not preclude the aforesaid Miller the full and exclusive privilege within the aforesaid contract to the full and complete franchise, both public and private, against themselves and their successors and others, so far as they are by law empowered, hereby debarring themselves from the privilege of conferring any further privilege and franchise in anywise to individuals, or otherwise, by means of which the aforesaid franchises may be impaired; also, revoking all orders or decrees of said Court in anywise conflicting with privileges and franchises hereby granted, provided the same is not now in use by others.

“And the said Miller further binds himself, his heirs and assigns, not to erect a bridge or bridges across the Coosa river from the junction to the extent secured in the foregoing charter, nor confer the privilege to any one else whereby it may injure the interests of the city of Rome.

“Four-horse wagon, cotton or other produce for market, thirty-five cents; four-horse wagon, cotton or corn, fifty cents; two-horse wagon, cotton or corn, twenty-five cents; two-horse carriage and barouche, forty cents; buggy and horse, twenty cents; man and horse, ten cents; footmen, five cents.

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“And the tolls imposed on the citizens of the county of Floyd shall be as follows, viz: Four-horse wagons, twenty-five cents; two-horse wagons, fifteen cents; close carriages, twenty-five cents; barouche, twenty cents; buggies and one-horse wagons, ten cents; wood, fodder, shucks, oats, bricks, market provisions, not to exceed five per cent. on the value of the load; four-horse wagon load of lumber, to and from, twenty cents; two-horse wagon load of lumber, to and from, ten cents; going to and from church on Sunday, free upon all the bridges.

“It is therefore agreed by the said Inferior Court and the said H. V. M. Miller, that the foregoing contract for the more faithful and full compliance of the same, be signed by said Inferior Court and said H. V. M. Miller, and the same be entered upon the minutes of said Court.

(Signed)

“J. M. SPULLOCK, J. I. C.

“DENNIS HILLS, J. I. C.

“WM. T. PRICE, J. I. C.

“F. I. SULLIVAN, J. I. C.

“H. V. M. MILLER, [L.S.]”

“Whereas the Inferior Court of Floyd county, having heretofore granted a charter to H. V. M. Miller, his heirs and assigns, for the purpose of erecting bridges across the Etowah and Oostanaula rivers near the city of Rome, and application being made for an extension of one of the stipulations of the charter, by the terms of the aforesaid charter the bridge across the Oostanaula was to have been completed during the summer and fall of 1851: Ordered by the Court, that the time for the completion of the bridge be extended until the first day of January, 1853, nothing in this order to be construed so as to alter or change any other stipulation or requirement of the aforesaid charter, this October 14, 1851.

(Signed)

“J. M. SPULLOCK, J. I. C.

“WM. T. PRICE, J. I. C.

“F. I. SULLIVAN, J. I. C.

“DENNIS HILLS, J. I. C.”

These complainants shew that the aforesaid agreement, thus signed and executed, together with the modifying order, constituted a valid contract between the said Miller and said Court, and under the Constitution of the United States could not be impaired, even by legislative action without just compensation. Shortly after said contract was made, to-wit: September 24th, 1851, and on May 5th, 1853, Alfred Shorter then, and at the time of the contract, one of the company with said Miller, purchased for a valuable consideration, the entire interest in said franchises and privileges, and proceeded in the utmost good faith to carry out his part of the contract. One of the considerations was, that the new bridge built across the Oostanaula at the junction of that river with the Etowah, and like the bridge across that river, at or near the foot of Broad street, should be removed some half mile up said river Oostanaula, at the foot of Bridge street, fronting the Court-house, or that it should be closed up, or a new one built. The said bridge had just been completed, was covered in and set on excellent and double stone pillars, and was of the value of \$12,000 00 or \$15,000 00, or some such sum. This, by the contract, became a loss to said Shorter, except a few hundred dollars for which the lumber sold when pulled down, as it shortly afterwards was. The said Shorter built a new and substantial bridge in front of the Court-house, as he had contracted to do, on double stone pillars, of the like value. So that what he contracted to lose, and what he contracted to do in this matter alone, cost him some \$25,000 00 or \$30,000 00, or some such sum.

In addition to this, the said Miller had assumed to take the place of the Court in a most improvident contract with William R. Smith, which said Court had made, and this the said Shorter, by his purchase of the entire interest, did assume. Said bridge was partly constructed, but was situated at a narrow place in the river, with one end on a steep bank where the water swept with great force, and before it was ready for use, the said bridge was washed away by a flood and came well nigh taking the bridge at the foot of Broad street along with

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it, and another effort being made at the same place, fell down. The said William R. Smith was satisfied with his experiments and never proposed to renew said building. His contract with the Court was only for twenty years and has expired. The contractor, Shorter, by assuming this improvident contract for the Inferior Court, lost several thousand dollars more, thereby saving the people of the county harmless.

In addition to these circumstances, the said Shorter, or those under whom he claimed, contracted to keep for the use of the people of Floyd county and the city of Rome, at his and their own expense, free bridges for all on foot and horse at all times, and all carriages going to and from the church on Sabbath, and for but small tolls at other times, and did reduce the tolls greatly in accordance with said contract, thus making a most judicious contract for the people. And further consented to a reduction of tolls on their former contract with the Inferior Court, amounting, in a few years, to thousands of dollars, which was done in pursuance of their contract, which by an appeal to the Supreme Court of the United States from the decision of the Supreme Court of the State of Georgia, they had reason to believe they might have avoided, as also, the other disadvantages of the contract.

These complainants show that at great labor, trouble and expense, the obligations of said parties contracting with said Court were fully and faithfully performed by them, and have since been by their assigns, and that those under whom they claim and themselves, have been in the peaceful and quiet enjoyment of exclusive privileges under said contract for over twenty years.

Your orators show that on the 14th day of May, 1862, Augustus R. Wright purchased of Alfred Shorter, then sole owner of said franchises, the one-half interest in the same at and for the sum of \$25,000 00, and as such joint owners, the said parties, the present complainants, have discharged their obligations, keeping bridges good and safe, for the use of the public and people of Floyd, on the terms aforesaid, except as hereinafter specified. During the late war between the States

of the South and the Federal Government, the Confederate troops, upon evacuating Rome, burnt both bridges, to-wit: on or about the ... day of, and they so remained to the close of the war. Nevertheless, immediately upon the evacuation of the city by the Federal forces, at great hazard and some considerable expense, complainants put in good ferry boats and passed the people over, the same being almost a total loss to complainants for, down to the surrender, they continued to take the Confederate currency, which was of little more value than the paper upon which it was printed or stamped.

These complainants show that after peace was declared and when the country was almost wholly exhausted of means, they were informed that unless they proceeded to rebuild, and that at once, the Inferior Court would proceed to let out the franchise to other parties, and this, too, notwithstanding complainants had put two boats on one river for the transportation of the people, because, even at this, persons and wagons were blocked up on the bank and compelled to wait for hours. Complainants, at heavy cost, proceeded at once to rebuild both bridges; and, whereas, before there had been single tracks, they proceeded now to make them wide enough for carriages and wagons to pass each other on the bridges, and this at considerable increase in cost, and when there was no legal obligation to do so; the said bridges put upon their previous stone pillars, costing complainants somewhere between \$12,000 00 and \$15,000 00.

And complainants charge further, that said Inferior Court, and their successors, and the present road commissioners have again and again, in various ways, recognized the franchises and privileges of complainants under said contract.

Complainants show that, some time ago, in the beginning of the present year, a company, designating itself as the South Rome Company, purchased a farm of about three hundred acres, lying on the Etowah river, opposite and against the city of Rome, and some three or four hundred yards above the bridge across the Etowah, owned by complainants, with the avowed intention of speculating on the same, by laying it off

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into a town and selling lots, and in order to do this successfully, gave out that they would build a bridge at the end of Howard street, in the city of Rome, across to the opposite bank owned by them. Alfred Shorter was one of this company at its formation, expecting and believing that some satisfactory arrangement would be made by purchase or otherwise, of himself and his joint owner, Augustus R. Wright, of the privilege to build a bridge, but no arrangement was made, and the said company resolved to build a bridge at all hazards, which, when the said Shorter understood, he sold out his interest in said farm, determined that his franchise should not be interfered with.

Said company, as complainants are informed, is now composed of G. W. Nagle, Daniel Adams, Hines Smith, as trustee for his wife, and Hugh Dickson Cothran, the present Mayor of the city of Rome, all of the county of Floyd and city of Rome. Complainants show that the company declare they will build said bridge, either as a free bridge for the public or as a toll bridge, and have proceeded to erect, on wooden pillars, two spans of wood across the said Etowah, at the foot of Howard street, and on said street, as complainants are informed; by whose permission complainants know not. Complainants suppose, that in pursuance of their declarations and plans, they will go on to finish the same for the use of the public, either as a toll or free bridge, the same being less than three miles from the junction of the Etowah and Oostanaula, and therefore within the franchise of complainants and which, if permitted to be done, would greatly injure and impair the rights and franchises of complainants. And though complainants might sue them at law, they are not sure they could respond in damages, as complainants consider said damages must necessarily be heavy, and if capable of responding now, complainants have no certainty they will continue so, and even if they did, it would require a great multiplicity of suits at law continuing for an indefinite number of years.

In tender consideration whereof, and inasmuch as com-

plainants are remediless at law, and can only have complete and full remedy in a Court of equity, where matters of this sort are properly cognizable and relievable, to the end, therefore, that justice may be done in the premises, and such decree be had as is just and equitable, and particularly that said defendants, their agents, confederates and servants, be perpetually and forever enjoined from opening said bridge to the use of the public, either as a free bridge or a toll bridge, or doing any other act in or about the matter whereby the franchise and privileges conferred by said contract may be injured or impaired. And if the road commissioners of the county of Floyd, who, by law, now represent the Inferior Court, (abolished,) should at any time be applied to, to open and establish roads thereto, they may be perpetually and forever enjoined, according to the terms of their contract.

May it please your Honor to grant unto complainants the State's most gracious writ of injunction, restraining the defendants, under a penalty to be therein inserted, from opening or using said bridge for the public as a free bridge or toll bridge, till the further order of this Court and the final hearing, and also the State's most gracious writ of subpoena directed to each of said defendants, Nagle, Smith, Adams, Cothran, to be and appear at the next Superior Court to be held in and for said county, then and there to stand to and abide by the order and decree of the Court.

Complainants do not ask for defendants' answers, because they are fully able to prove the facts alleged.

The only portion of the defendants' answer material to an understanding of the decision, is as follows :

Respondents say, that before the completion of said bridge, and before said bill was filed, they had prepared a petition to the commissioners of roads and revenue of Floyd county, who are now by law vested with the exclusive jurisdiction over the subject, for the opening of said bridge to the public, and the establishment of the same as a public bridge, and with the prayer that said commissioners adopt certain streets on respondents' property as a highway, and hereafter lay out,

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as prescribed by law, other highways leading to the same, for the benefit and advantage of the public, fixing such rates of toll as will simply pay the interest on the investment, or cost of the bridge, and as will keep the same in repair. And that said application was made to said commissioners at the December term, 1872, and the prayer of respondents was granted.

Respondents further show that on the 16th day of April, 1872, while said Shorter was a member of said company, then known as the South Rome Town Company, now as the East Rome Town Company, respondents gave to said complainant, A. R. Wright, written notice of their intention and purpose to erect said bridge, and requested him to make known his objections to the same, if any he had. To which said notice said Wright made no reply, either verbal or written, and suffered respondents to proceed with the work until said bridge was near completion before he filed his said bill. Respondents submit, that it is now too late for him to enjoin its use, either as a public or private bridge, he having allowed the building thereof, and having waived his suit until respondents had expended about \$7,000 00 on said bridge, and until the same was within a few days of completion, the same having been completed within five days after said bill was filed. And the said Shorter cannot enjoin the use of said bridge for either of said purposes, he being one of said company when said notice was given, and acting with it, in the giving thereof. The said bridge does not consist of two wooden spans alone, but is a first-class truss bridge, built in the best manner, and with the best of material, wood and iron, and cost, with the approaches, between \$8,000 00 and \$9,000 00, and is really worth more to-day, than either of complainants' bridges, with their stone piers. No member of said company, while said Shorter was one thereof, ever expected, understood or agreed, nor did they, or either of them, ever have any notice that they were, or would be enjoined, or expected to pay said complainants, or either of them for the privilege of building said bridge. On the contrary, it was understood that they would be allowed, so far as said Shorter was concerned, to proceed to execute their pur-

pose, in this respect, without let or hindrance. It is admitted that the bridge built by respondents is within three miles of the junction of the Etowah and Oostanaula rivers. Respondents deny that they are not responsible for any damages complainants may sustain. Collectively, they are worth over \$100,000 00, and are amply able to pay any damage complainants may sustain, but they submit to the jurisdiction of the Court, without demurrer to complainants' bill, that their rights and the right of the public may be adjudicated and determined. Respondents deny that said complainants have any exclusive rights whatever, to erect a bridge or bridges, as claimed, and to charge and collect toll thereon. Because they say that said Inferior Court, if they granted any such right, had no authority to do so, and such grant is void, and if they did have such authority by law it was limited to fourteen years, by the statutes of Georgia, and now by the Code of Georgia to twenty years; and such franchise or contract as claimed, if ever valid and binding, has expired by law and is now extinct. And if said complainants claim under a contract with said Inferior Court, said Court exceeded its authority in making such a contract, and if any one is liable, said Justices, as individuals of the county of Floyd, are liable for the breach thereof, and no remedy can be had against respondents by injunction or otherwise. And that when said alleged charter was granted or said to have been granted, to-wit: in 1851, said Justices of the Inferior Court, sitting for county purposes, had no authority to incorporate any company for any purpose whatever, and that said Justices had authority to incorporate only when sitting as a civil Court for the trial of civil causes, as provided by the Constitution of the State. That as a *quasi* corporation, sitting for county purposes, they were only authorized to license and open to public use, and to discontinue bridges, ferries and roads, and not to incorporate, or grant exclusive privileges to any company; and while sitting as a civil Court, under the Constitution, they were bound to incorporate any company that complied with the law authorizing incorporation, and could not therefore exercise any

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authority, or grant any exclusive privilege to any company or person that would abridge their power, or the powers of succeeding Courts. That said Court was invested with no legislative or *quasi* legislative authority or power whatever. But that since the Constitution of this State was amended in 1856, so that the General Assembly of Georgia debarred themselves from incorporating bridges and certain other companies, said Court and its successors, and now the commissioners of roads and revenue of Floyd county, are vested with legislative or *quasi* legislative and exclusive powers on this subject, and therefore, the incorporation of respondents' company or the order making said bridge and streets public has all the authority, sanction and effect of an Act of the Legislature of this State, and cannot be interfered with by the unauthorized and void act of any public functionary of this State.

Respondents further show that the building of their bridge, and its use, either as a private or public bridge, in no way interferes with the actual or physical use of complainants' bridge by them, or with their collection of tolls over the same, and that the public good, and the interest of the people of the city of Rome is greatly subserved and accommodated by the act of the commissioners in making the respondent's bridge a public bridge, and in opening suitable highways to the same.

Respondents further answering say, and so do said commissioners, by their attornys, that said injunction cannot issue against said commissioners, or operate on them, for that injunctions can only issue against the parties, and not against a Court having jurisdiction over the subject matter.

Respondents further say that they are authorized by law, without any action or order from said commissioners, to use said bridge for themselves, and so are their assigns who may become joint owners in said lands and bridges and streets, or in any part thereof, and of this they ask the judgment of the Court.

The injunction was refused by the Chancellor, and complainants excepted.

UNDERWOOD & ROWELL; WRIGHT & FEATHERSTON, for plaintiffs in error.

SMITH & BRANHAM, for defendants.

The right to establish a public bridge is a franchise which can only be granted by the State: 6 Ga., 130 (1;); 7 Ga. 352; Greer *vs.* Haugabook 47 Ga., 282. The Justices granted the charter, so far as they had authority to do so: See exhibit No. 1. They seem to doubt their power in the premises. The complainants made no application for license, according to their statement, in the bill; but defendants say they procured the charter, and it was not the voluntary offering of the Court. They gave no bond for the performance of their duties and obligations. They cannot be compelled to execute their part of their alleged contract, which they claim endureth forever. The contract is *nudum pactum* unless the Justices had the power to grant exclusive privileges, not only in fact, but in law: 1 Par. on Con., 383 and note 3. The proprietors may discontinue, and therefore the Justices cannot enforce the contract: Code, 729; 25 Ga., 459. The commissioners of roads and revenue of Floyd county have licensed the defendant's bridge as a public bridge, but not as an exclusive one, as far as they have authority to do so, and have declared it a public necessity in the strongest terms. It was in their discretion to do so. They were clothed with "exclusive jurisdiction" "in establishing, altering and abolishing all roads, bridges and ferries in conformity to law:" See Act 1871-2, page 226 and 41 Ga., 222. And therefore no injunction can issue against them: See 18 Ga., 475; 20 Ga., 134; Story's Eq., 875. The Justices of the Inferior Court exercised the powers of three distinct institutions. A Court sitting semi-annually for civil business, under the Constitution, with certain powers: Cobb's Dig., 1122. A Court of Ordinary. A body sitting for county purposes and as a *quasi* corporation. And while sitting for one purpose they could not exercise the powers of the other Courts: 9 Ga., 485; 3 Kelly, 40, (3.) While sitting as a civil Court they had power

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to grant charters: Cobb's Dig., 542; Act 1843. But they could not charter for a longer period than fourteen years, until the adoption of the Code, when the time was extended to twenty years: Act 1843, sec. 285. While sitting for county purposes, they only had power to license and not to charter. Authority to establish a bridge, means only authority to license. The Code uniformly uses this term: Code, sec. 710, par. 3, 720; 6 Ga., 144. The word license means permission: 11 Mich., 45; 6 Wheat., 190; 5 Hill, 211; 5 Cowen, 462. "Highway," or "road," includes bridges upon the same: Code, sec. 5. They had express power to open roads. To discontinue such roads, etc., as may be found useless, and to alter roads, so as to make them more useful and convenient, as often as occasion shall require: 20 Ga., 129-30; 9 Ga., 478. And they and their successors have the same power over bridges: 20 Ga., 364; Code, 733; Acts 1871-2, 226, (51.) For bridges erected under an Act of the Legislature, or under order of the Inferior Court, are public bridges: Cobb's Dig., 944, (5;) Code, 707. The same is true of roads: Cobb's Dig., 943, (1;) Code, 638. Both may be discontinued as public bridges or roads by the Court. And the owner of a public bridge may discontinue it: Code, 729. Before the adoption of the Code, the Court or the licensee might have discontinued at any time, at their option. For the license was not granted for any definite period. But by the Code the license is limited to ten years: Code, 710.

The Justices had no power to grant exclusive privileges unless that power is "found in and derived from the laws of the land, and exercised in the mode and manner that the law prescribes:" 12 Ga., 424; 6 Peters, 729, U. S., *vs. Arredondo*; 9 Cranch, 87; 10 Ga., 206; 41 Ga., 376, *Dart vs. Orme*; 8 Conn., 254, *Willard vs. Killingworth*; 10 Conn., 442, *Higley vs. Bruce*, affirms *Willard vs. Killingworth*; 2 Kansas, 127-8, 134, *Commissioners of Shawnee Company vs. Carter*; 31 Vermont, 153, *State of Vermont vs. Towns of Williston and others*; 30 Md., 218, *Horn vs. Mayor and City of Baltimore*; 8 Greenl., 365, *Day vs. Stetson*; U. S. An. Dig., 2 vol.,

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423, (1;) 11 Ohio, (N. S.) 183, Blanchard *vs.* Bissell; U. S. An. Dig., 1861, 147; 7 Cranch, 366, Lee *vs.* Munroe & Thornton; Story on Agency, 307 (*a.*) In some cases public agents and officers, who exceed their authority, make themselves individually liable: 1 Par. on Con., page 106.

The powers of the Justices to establish bridges is contained in the following statutes: Act 1799, Cobb's Dig., 944, section 11. This section makes bridges so established public bridges, and gives to the Court "full power and authority to appoint the places for erecting public bridges:" Act 1805, page, 945, section 1. It is under this section that complainants claim their franchise. By it the Justices are empowered if they should deem it necessary, on application being made, to authorize the establishment of such ferries or bridges as they may think necessary, other than where ferries and bridges have already been established by law, etc.: "*Provided*, that the Legislature shall at all times retain the power of making such alterations in the establishments made by the Justices of the Inferior Court as to them may seem proper:" Act 1818, page 952, section 29, authorized the Court to act "in term time while sitting for ordinary purposes, or at any special meeting held for that purpose." These acts embrace the whole law on the subject, and from it the following conclusions are made: 1st. The Justices were only authorized to Act "on application being made." 2d. The word used is *established*. 3d. The establishment of bridges was discretionary with them. 4th. They were authorized to establish as many bridges as they thought necessary, other than those already established by law. 5th. There is no express authority to establish one bridge only, with exclusive privileges within any given limits. Such authority cannot be found in the words of the Act, nor can it be reasonably implied from them. On the contrary, the authority to establish such other bridges as they may think necessary expressly negatives such a construction. 6th. By the proviso, it is clear that their powers were limited, and that the power to make exclusive grants remained in the Legislature. It was not until the 12th of December, 1855, when

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the Constitution was amended, that the Legislature divested themselves of the power to establish bridges: Acts 1855-6, page 106, section, 2. The only authority the Justices had to make contracts in reference to bridges, related to the building of county bridges. And the mode in which that power should be exercised and money raised to pay for the bridge is specifically prescribed: Cobb's Dig., 958, section 65; Code, 709, 711.

Public grants are construed most strongly against the grantee. The grantee takes nothing by implication, and can claim nothing not expressly set forth in the Act under which the grant is made: 13 How., 81; *The Rich. R. R. Co. vs. The Louisa R. R. Co.*; Code, 2331, 2208; 11 Peters, 544, *Charles R. B. Co. vs. Warren B. Co.*; 8 How., 579; 1 Kelly, 533; 3 Kelly, 31, (3); 5 Ga., 561, powers of corporation; 7 Ga., 221; 9 Ga., 517, (3,) (4,) 524, 213, 221, 475; 8 Bush., 31; 9 N. Y., 451, 452, 453, *Auburn & Cato Plank R. Co. vs. Douglas*, and authorities quoted. In this case, it was held that the grantees take nothing by implication, either against the power making the grants, or against other corporations or individuals: See head-note, 444; 6 Wend., 85; 25 Ga., 445, 457, *McLeod et al. vs. The Sav. & Albany R. R. Co.*; 27 N. Y., 92-3; 21 Penn., 22, *The Penn. R. R. Co. vs. The Canal Com'rs*; 30 N. Y., 44, 53, 62, *Fort Plain Bridge Co. vs. Smith*; 4 Green, (Iowa) 532; Dillon on Municipal Cor., 124, 102, 3, 4; Cooley on Const. Lim., 196-7, and note. In the case in 13 Howard, 71, *The Richmond, Fredericksburg & Petersburg Railroad Company vs. The Louisa Railroad Company*, the Legislature of Virginia had pledged itself, in the charter of the Richmond Railroad Company, for a consideration which had been performed, not to allow any other railroad to be constructed within certain limits, the probable effect of which would be to diminish the number of passengers on that road, or compel the company, in order to retain such passengers, to reduce the passage money: 16 How., 524, head-note, *Fanning vs. Gregoire & Bogg*. Unless exclusive privileges are granted, no reservation of the power of repeal is necessary to be made in the grant: *Ibid.* 11 Leigh, 70, 1, 2, 3, 4, *Tuckahoe Canal*

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Co. *vs.* Tuckahoe R. R. Co.; 35 Miss., 189; 4 Iowa, 532, *McEwen vs. Taylor*; 1 Black, 436, 446, *Jefferson Branch Bank vs. Skelly*; 6 Paige, 554, 564-5, *The Mohawk Bridge Co. vs. The Utica & Schenectady R. R. Co.*; 12 La., 649, *Curtis & Phelps vs. The Parish of Morehouse*; 31 Miss., 679, 699, *Collins et al. vs. Sherman*; 3 Wall, 210, *Turnpike Co. vs. The State*. Unless the whole legislative power was delegated to the Justices, and unless the Justices had exclusive powers and authority, they had no power to grant exclusive privileges to others. Authority to establish bridges and ferries does not convey the power to grant exclusive rights. And especially is this true, if the Justices were authorized to establish as many bridges, other than those already established by law, whenever and wherever they may deem such bridges necessary: 25 Wend., 628, *Costar vs. Brush*; Charter N. Y. 1730, sec. 15; 8 How., 579, *Mills vs. Co. of St. Clair*; 7 Ga., 352, *Williams vs. Turner*; 6 Ga., 130, (3) 144; 15 Pick., 243. "An Act incorporating a town and vesting the authority of a town with certain powers does not divest the State or County Courts of powers vested in them by the general law, unless the Act of incorporation declares the powers in the corporation to be exclusive:" *Baldwin vs. Green*, 10 Miss., 410; *Harrison vs. State*, 9 Miss., 530; U. S. An. Dig., 1848, 75, 195; 10 How., 511, *East Hartford vs. Hartford Bridge Co.*; 13 Ill., 413, 424, 428-9, 430; 9 Mo., 530, *Harrison vs. The State of Missouri*. The power is denied in this case, because the word exclusive was omitted from the Act of the Legislature: 21 Cal., 238, 252-3, *Fall vs. County of Sutter*; 25 Conn., 31, *The Norwich Gas Light Co. vs. The Norwich City Gas Co.*; 4 Cold., 406, *Memphis City R. R. Co. vs. Memphis*; U. S. An. Dig., 1868, 128, (175.) Held in this case, "A municipal corporation cannot, by contract, confer upon individuals the exclusive right of constructing and operating street railroads on the public streets for their own benefit and use:" 2 Porter, 296, *Dyer vs. The Tuscaloosa Bridge Co.*; 10 Ala., 38, *The Mayor and Council of Columbus vs. Rogers et al.* In this case, the legislative grants of Georgia to Columbus, and of

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Alabama to McDougal, who conveyed to the city of Columbus, were exclusive.

The Inferior Court held a public trust, a limited legislative power, and could not, by any exclusive grant it might make, impair its exercise, by themselves or their successors, restrict its use or part with its power: 10 How., 535-6, *East Hartford vs. Hartford Bridge Co.*; 6 Wheat., 596-8; *Goszler vs. the Corporation of Georgetown*; Dillon, 110, 124-5, 541-2, 305, 322-7; 5 Cowan, 538, *Presbyterian Church vs. The City of New York*; 12 Illinois, 1, *County of Richmond vs. the County of Laurence*. It was held in the case in 10 How., 535, that towns and counties possess only public, political or legislative power, to be exercised solely for the public good, subject at all times to legislative control: 17 Barb. Sup. Ct. Rep., 435, *Millian vs. Sharpe*; 27 N. Y., 611, 622, same case; 20 N. Y., 370, *Aiken vs. the Western R. R. Co.*; 32 Maine, 431, *Green vs. the City of Portland*, head-note. "A corporation has no powers except those expressly conferred and such as are necessary for the exercise. A municipal corporation holds its powers in trust and cannot delegate them. The trustees of the town of Oakland had, by stat., 1852, power to make and maintain wharves, etc. They granted to A B the exclusive right to maintain wharves for a term of years. *Held*, that the grant was a transfer of their corporate power, and therefore void. That the city of O., which succeeded to the town of O., could have the grant canceled and the wharves surrendered by A B:" 13 Cal., 540, *Oakland vs. Carpentier*; U. S. Dig., 1860, 225. To same effect is the case of the State of N. Y. *vs. the Mayor and Aldermen of the City of N. Y.*, 3 Duer, (N. Y.) 119; U. S. An. Dig., 1856, 158, (194.) This was an exclusive grant to a railroad company over Broadway: 2 T. R., 169; 25 Conn., 19; 1 Strange, 299; 2 Strange, 1161; 7 Cowan, 585, 606-7, *Stuyvesant vs. The Mayor of N. Y.*; 6 Dana, (Ky.) 43, 47, head-note; *Carter & Arnold vs. Kalfus and Watts*. In this case the ferry was, by statute of Kentucky, exclusive with one and one-half miles, except when the public interest required others. A second

grant was sustained: 18 Ohio, 262; the State *ex rel.* vs. the Cincinnati Gas Light and Coke Company. This case is conclusive on the points made in complainant's bill. See the whole case: 23 Howard, 435, Dillon on Municipal Cor., 78-9 and 80; Cooley on Const. Lim., 206-7 and note. In the case in 6 Ga., 130, the prayer in the bill is similar to the prayer in the case at bar: See page 134.

The case in 9 Georgia Reports, page 517, Shorter *et al.* vs. Smith, contained most of the points made in this case. Three grounds of relief were set forth in that case, viz: 1. A prescriptive ferry right across both rivers. 2. By virtue of a solemn contract between the complainants and County Court, it was claimed the Court was bound for a valuable consideration to continue to complainants the sole and exclusive use of their franchise. 3. The right was claimed because the contract had been recognized by all preceding Courts: See page 521. These questions were decided adversely to complainants in that bill: See page 530. Section 5, 9 Ga., 517, does not hold that the Inferior Court may grant exclusive privileges. It is not so set forth in the head-note or in the body of the decision. This question was not in that case. In every case in which private persons or corporations have maintained exclusive rights against the public, the grants were issued by the Legislature of the State or by the Crown, or by some officer or corporation vested with the *whole* legislative authority and power of the Legislature or of the Crown. And it is extremely seldom that such authority is ever delegated by the State. In such cases the Legislature cannot resume the franchise without compensation, and in such cases only is this the rule. The provision for the admeasurement of distances, by the meanderings of the stream, in cases where persons hold exclusive bridge or ferry privileges, contained in Cobb's Dig., page 957, sec. 63, and in the Code, sec. 722, was originally a provision of a local act, and referred only to grants by the Legislature: See Act 1841, Pam. 187. It was made in view of such grants only. It is safe to say, with the exception of the case at bar, there has never been an exclusive

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grant made by any Inferior Court of this State. That portion of the decision in 9 Ga., 517, bearing on this question, was made solely with reference to Legislative grants: See pages 526-7, and head-note 5. Can the Inferior Court resume a franchise and make compensation? The statute does not seem to give any such authority. The franchise of the West River Bridge Company, which was granted by the Legislature, and which was exclusive, and the bridge itself was taken and made a free bridge by the County Court of Windham county, Vermont. But the statute of that State gave the Court express authority to do so: See 6 Howard, 507. Only a land owner can move for compensation in Georgia. The Court cannot move, nor can any adverse party: Code, 676. Such a grant as complainants claim is against the policy of the law. It is to them, their heirs and assigns forever. We have seen the Act of 1843 limit charters to fourteen years, the Code to twenty years, and that the Code limits such licenses to ten years. All patents and copy rights are limited. In the case in 11 Peters, the charter was limited to seventy years, and that was held against the policy of the law. How stands, then, the case of a perpetual grant made by the Justices, without authority of law, and clearly beyond their powers? The use of defendant's bridge interposes no physical obstruction to the enjoyment of complainants' bridge by them, or by the public, or the collection of tolls over the same. Bridges are not authorized for remunerative purposes to the owners, but for the benefit of the public, whose interest is their first and paramount object: American Law Review, October, 1872, page 238; 8 Bush, Piatt vs. C. & C. Bridge Co., 31; 2 Cowen, Sprague vs. Birdsall, 419; 2 Porter, 226, Dyer vs. Tuscaloosa Bridge Company; 7 Pick; 11 Peters, 420, Charles R. B. Co. vs. Warren B. Co.; 1 Duval, 135, Richmond & Lex. Turnpike Road vs. Rogers; 16 Conn., 149, Hartford Bridge Co. vs. East Hartford; 17 Conn., 79, Hartford Bridge Co. vs. East Hartford; 10 How., 51, Hartford Bridge Co. vs. East Hartford; 17 Conn, 454, Enfield Bridge Co.; 29 Conn., 210, Hartford Bridge Co. vs. Union Ferry Co.

McCAY, Judge.

Whilst we are very clear that our judgment in this case is right, we cannot forbear expressing our regret, that the enforcement of a stern rule of law operates hardly upon the plaintiffs in error. We feel satisfied that the plaintiffs have, at any rate, in their action since the war, supposed they had this exclusive right, and that they have expended money under that impression, which, perhaps, they would not have expended had they been aware that their contract with the Inferior Court for this exclusive right was invalid. And were it possible for us, without violating the law, to sustain their grant, we would cheerfully do so. But, in our judgment, the Inferior Court of Floyd county had no authority to make such a grant, and to recognize it would be to establish a dangerous precedent—both because it would be the making of a law by this Court, and because such a law would be in itself a bad one, contrary to good policy and against the public interest. The Act of 1805, section 1, is as follows: “The Inferior Courts of the several counties of this State are hereby empowered, if they should deem it necessary, on application being made, to *authorize the establishment* of such ferries or bridges as they may think necessary, other than where ferries and bridges have already been established by law, and to allow such rates,” etc. Provided that the Legislature shall at all times retain the power of making such alterations in such establishments made by the Justices of the Inferior Courts, as to them shall seem proper. The plaintiffs in error claim that they have the exclusive right to build bridges over the Coosa and Etowah rivers, for three miles in each direction, from the point of their junction in Floyd county, and they claim this by virtue of a contract made with them by the Inferior Court of Floyd county, in June, 1851. Upon this contract they say they have acted from that day till this, expending their money and doing other acts which they would not have done except for that contract.

As we have said, we think the abstract equity of the mat-

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ter is with the plaintiffs, and it is only because we think the Inferior Court had no power to make such a contract, or to bind the public by their action in it, that we feel constrained to affirm the judgment of Judge Harvey refusing the injunction.

The Inferior Court (now the Ordinary) is not and never was the public. It is the mere agent of the public, clothed by law with authority to do for it certain specified acts. It is a settled rule, not only in this State but in all the States, and in England, that such public agents have only such powers as are granted them; that they take nothing by implication, and that the law granting their powers is to be strictly construed: 13 Howard, 81; 1 Kelly, 533; 3 Kelly, 31; 1 Kelly, 561; 6 Wend., 85; 27 N. Y., 92; 21 Penn., 22; Cooly's Con. Lim., 196-7, and note.

The Act of 1805 simply confers upon the Inferior Court the power to authorize the establishment of bridges and ferries, and to fix the rate of toll. The power to grant to any one an exclusive right, if it exist, must be derivable from this power to establish. Can such a power be so derived, under any rule, consistent with the authorities? When this grant was made, (1851) there existed, by the laws of this State, (Act of 1850, Cobb's Digest, 958,) a right in the owners of the land above and below this bridge to build, at their pleasure, bridges over it, on their own land. Could the Inferior Court, under this general power, quietly, at their office, convey to these plaintiffs this right, then belonging to other people? We think not. The right to grant an exclusive privilege to build a bridge does not, either in its words or by any fair construction, arise from a mere right "to authorize the establishment of bridges." It is not a necessary incident, since it is only in few cases that such exclusive privilege is granted. It may be true that there are cases where parties would be unwilling to erect bridges unless they could get a guarantee that no one else should build within two, or perhaps ten miles. But to infer the power from this would open a very wide scope to the powers of the county officials, since it is just as true that there

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are cases where a bridge could, perhaps, be put up if the builders could be exempt from tax—have a right to issue bank bills, etc., and thus, under the power to establish a bridge, the Inferior Court would draw to itself the power to do almost anything. .

The right to have a franchise is one thing ; the right to deny to any others, for all time, to have another franchise is another and quite a different thing. The one is a grant, the other is a contract that the public will not grant to others. They are such rights, different in nature and character, and it may well be that the Inferior Court had full power to grant the one and no power to do the other. The Inferior Court was a public agent ; it had a duty cast upon it to authorize such bridges as it then thought necessary. The duty was a continuing one. It existed after this bridge was authorized, it continues still, and it was not, and is not, in the power of the Court to abrogate it.

We have looked into the authorities on this subject and find them uniform. In 6 Wheaton, 597, Chief Justice MARSHALL, in discussing the right of a city to regrade streets after it had done acts from which a contract not to regrade was implied, says : "The power to graduate was a continuing one, given by the Legislature, and was not exhausted by its first exercise." And Judge LUMPKIN, in 23 *Georgia*, 404, after repeating this same thought, adds, "and any agreement to fetter or clog this power would be void." Dillon, in his work on municipal corporations, lays down the doctrine broadly, thus : "Powers are conferred on municipal corporations for public purposes, and, as their legislative powers cannot, as we have seen, so cannot *they* be bargained or bartered away." Dillon on Mun. Cor., 110, and cases cited. That the power to grant an exclusive right is not derivable from the power to establish, is settled by a very numerous body of authorities. Boroughs and towns (much more mere *quasi* corporations, like county boards and overseers,) have only authority to bind the public when the authority is expressly given : 12 Ga., 424 ; 6 Peters, 729 ; 9 Cranch, 87 ; 10 Ga., 206 ; 8 Conn., 254 ; 10 Conn., 254 ; 30

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Maryland, 218; 7 Cranch, 366. In 9 *Georgia*, 525, this Court, quoting Judge TANEY, says: "When a corporation alleges that a State has surrendered for seventy years its power of improvement and public accommodation in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist that the abandonment ought not to be presumed, unless the deliberate purpose of the State to do so does clearly appear."

That the power to grant *exclusive* rights does not in such cases exist is settled by the following cases: 10 *Mississippi*, 530; 10 *Howard*, 511; 13 *Illinois*, 413-424; 9 *Mississippi*,; 21 *California*, 238. In 25 *Connecticut*, 31, a city had granted to a company an exclusive right to lay gas pipes, and the grant was held void; 2 *Porter*, 296; see, also, 18 *Ohio*, 262; 23 *Howard*, 435. This case in 23 *Howard* is very like the case at bar, and contains the authority of the Supreme Court of the United States upon the very exact question made in this record. There the Legislature had authorized a municipal corporation, as it has here done the Inferior Court, to establish ferries. The corporation, in establishing a ferry, granted to the grantees *an exclusive right*. The Supreme Court of the United States held the grant void, as beyond the power of the corporation. The Act of 1845, Cobb's Digest, 957, which has been claimed as conferring some additional power on the Court, does not apply to public bridges owned by private parties, and was simply authority to the Court to take any method it saw fit to have *its own* bridges built and kept in repair instead of the mode hitherto provided, of a board of commissioners and a bond to keep the bridge up for five years. Nor do we think the change in the Constitution, divesting the Legislature of the power to establish ferries and bridges, and providing that the General Assembly shall confer it upon the Courts, affects the question. The Legislature *has not*, under this clause, yet *provided* any authority to a Court to grant an exclusive right and we doubt if it can do so. The truth is, the existence of such a power is a dangerous one at any rate. One that ought not to pass out of the Legislature, and is greatly

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liable to abuse there. By our laws now, the Ordinary may charter a hotel company, a manufacturing company, etc. Can it be that as the Constitution clothes the Ordinary, as an incident to this, with the right to contract that no other company shall be chartered? It seems absurd to say so, and yet this is the inevitable result of the logic insisted upon.

We sympathize, as we have said, with the plaintiffs in error. It may be that this bridge will hurt their enterprise. But if they have no legal grant, they have no legal redress; it is *damnum absque injuria*—hurt without wrong—disadvantage without illegality. The public is under no legal duty to them, and has violated no legal right in them. When this is the case, however much may be the hurt, there is no redress. The party hurt took the risk; acted with his eyes open to the probable consequences. Nor was there any thing, either in the case itself, or in the language of Judge LUMPKIN in his opinion in *Shorter vs. Smith*, 9 *Georgia*, 517, to justify the action of the Inferior Court in making this contract. The question there was, had such a contract been made? This Court decided not. There was no call for an investigation of the power of the Court to make it. Nor does the language of Judge LUMPKIN intimate that any such power existed. True, he says the Legislature may grant to a local agent the authority to exercise the right of eminent domain, and adds that such a power in local bodies had always been exercised. And this is very true. The authority to lay out roads is such an authority, and from our earliest history it has been exercised by local bodies. But we doubt if the power to contract away the right of the public to have a bridge over a stream, can be classed under the right of eminent domain at all. At any rate, it is clear that Judge LUMPKIN in his remark, was alluding to the right of establishing bridges, which it was contended could not be delegated, and not the right to abrogate the duty, conferred by the Act of 1805. So, too, when he speaks of the Inferior Court as the agent of the Legislature. He is treating of the right of the Court to authorize the laying out of roads and establishing ferries and bridges, and not of any

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authority in the Court to contract that no bridge shall be established within certain limits, beyond the *immediate* vicinage of the bridge authorized, so as to obstruct the franchise.

Altogether, as we have said, we think the want of power in the Court to make this contract is clear ; that the plaintiffs got no exclusive right under it; that their expenditure was at their own risk, and if they have been mistaken it is their misfortune.

Judgment affirmed.

T. W. BRUNSON, plaintiff in error, *vs.* JOHN J. GRANT *et al.*,
defendants in error.

1. This Court having held in the case of Bailey *vs.* Park—22 Georgia Reports, 116—that a sale of land by the sheriff under an execution for the purchase money, in favor of the vendor against the vendee, where the vendee has only a bond for titles, and the vendor has not filed and had recorded in the Clerk's office a deed to his vendee for the land, before the levy is made, is illegal and void, and also reaffirmed the same principle in Harvill *vs.* Lowe and Smith, 47 Georgia Reports, 214, and this case coming within that principle, and the purchaser at the sheriff's sale being charged with notice, the Court erred in dismissing complainant's bill for want of equity : Code, section 3604.
2. If the purchaser at such sale be a third party, and has paid the price bid by him, and the same has been applied towards the extinguishment of the vendee's debt, he is entitled to be reimbursed out of the land to the extent of such payment of such debt.

Sheriff's sale. Bond for title. Lien. Execution. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1872.

T. W. Brunson filed his bill against John J. Grant and S. C. Lindsay, making the following case :

On June 5th, 1869, Grant sold to complainant a certain tract of land in Muscogee county for \$2,500 00, complainant paying \$1,500 00 in cash, and giving two notes for \$500 00 each, the first payable on September 1st, 1870, and the second

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on November 1st, following, Grant executing to complainant his bond, conditioned to make him a valid title to said property, on the payment of the aforesaid notes. When the notes became due, complainant was ready and willing to pay off and discharge them, if Grant would execute to him a title to said land in accordance with the condition of said bond, but Grant failing to comply with his contract, the notes were not paid. At the May term, 1871, of Muscogee Superior Court, Grant obtained judgment against complainant for the principal and interest due on said notes, and had an execution levied upon the aforesaid land, under which the same was sold on the first Tuesday in November, 1871, to S. C. Lindsay, for \$1,400 00, who was informed as to all the facts aforesaid, and was combining with Grant to defraud complainant. The property was worth a much larger sum than that for which it was bid off, but the public, knowing the title to the same to be still in Grant, would not pay the market value. On December 7th, 1871, the sheriff executed a deed to Lindsay, ejected complainant therefrom, and placed him in possession. In pursuance of said fraudulent combination, on January 6th, 1872, Grant executed a fee simple title conveying said land to Lindsay.

Prayer, that on complainant's paying to said Grant the \$1,000 00, with interest, due on said notes, the deeds aforesaid be canceled, and Grant compelled by decree specifically to perform the obligations assumed in said bond; that Lindsay be decreed to account to complainant for the rents and profits of said land; that the writ of subpoena may issue.

The defendant moved the Court to dismiss said bill for want of equity. The motion was sustained, and complainant excepted.

CARY J. THORNTON, for plaintiff in error.

BLANDFORD & CRAWFORD, for defendants.

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TRIPPE, Judge.

1. In *Parks vs. Bailey*, 22 Georgia, 116, which is just such a case as this, except that there the vendor was the purchaser, it was held that such a sale was illegal and void. That was under the Act of 1847, which is identical so far as it applies to this case, as section 3604 of the Code. In that case the Court say: "We are not disposed to weaken by construction this salutary law. By having the deed to the defendant made and recorded before the levy could be made, thirty days, at least, must elapse before a sale could be effected; and that purchasers would be inspired with confidence to bid for the property from the publicity given to the fact that the title was in the defendant."

The same decision was made in *Harvill vs. Lowe*, 47 Georgia Reports, 214, where the deed was filed a day or two before the sale, under said section of the Code. In those cases, the vendor was the purchaser. Here a third party was the purchaser. But that party is charged to have notice of all the facts alleged in the bill. In the case in 22 Georgia, a portion of the purchase money had been paid. In the other case, none had been paid. In this case there had been part payment. The section of the Code referred to makes no distinction on this account. Its provisions are general, and covers all cases of sales under judgments in favor of vendors for the purchase money. Section 3528 was intended to provide for cases where judgments were in favor of third parties, and where part of the purchase money had been paid. Then a levy could be made under such judgments, a sale had "of the entire interest stipulated in the bond," and an equitable distribution of the money made. Before this, such creditors were compelled to resort to equity, making both vendor and vendee parties, in order to reach the interest, which was only equitable, of the vendee. The creditor could make no deed, nor compel one to be made short of chancery. This section was intended as a remedy for the long and expensive proceedings that would otherwise have been necessary. We consider the

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decisions referred to as settling the question involved in this case.

2. Of course if the purchaser has paid his bid, and it has been appropriated to the payment of the debt due by complainant to his vendor, he is entitled to be reimbursed, and he should be protected to that extent in any decree that may be rendered.

Judgment reversed.

LEIGHTEN W. HAZELHURST, plaintiff in error, vs. JOHN H. & JAMES D. MORRISON, defendants in error.

When plaintiffs sue in their representative capacity, on a note due to their testator or intestate, and there is no plea in abatement filed at the first term of the Court, the plaintiffs are not required at the trial term to prove that they have been legally appointed executors or administrators. *Aliter*, if their letters testamentary or of administration constituted a part of their title to the property sued for. (R.)

Executors and administrators. Pleading. Title. Evidence. Before Judge SESSIONS. Wayne Superior Court. October Adjourned Term, 1872.

For the facts of this case, see the decision.

SMITH & MERSHON, by LESTER & THOMSON, for plaintiff in error.

J. S. WIGGINGS, by Z. D. HARRISON, for the defendants.

WARNER, Chief Justice.

The plaintiffs, as executors of George Morrison, deceased, brought an action against the defendant on a promissory note made by the defendant, payable to the plaintiff's testator or order, for the sum of \$1,136 75. The defendant filed no plea at the first term of the Court denying that the plaintiffs were executors, or that they were not entitled to maintain

Mosely vs. Lyon *et al.*

their action against him in that capacity. When plaintiffs sue in their representative capacity on a note due to their testator or intestate, and there is no plea in abatement filed at the first term of the Court by the defendant, the plaintiffs are not required at the trial term of the Court to prove that they had been legally appointed executors or administrators. It would be otherwise if the letters testamentary or of administration constituted a part of the plaintiff's title to the property sued for: *Macon & Western Railroad Company vs. Davis*, 18 Georgia Reports, 679.

Let the judgment of the Court below be affirmed.

MARY A. MOSELY, administratrix, plaintiff in error, vs.
EMANUEL LYON *et al.*, defendants in error.

Where, in October, 1858, the sheriff took an insufficient bail bond, and at the first term thereafter the plaintiff proceeded to have the sheriff and his securities on his official bond, declared by the judgment of the Court, special bail for the defendant, and having obtained judgment for his debt, he proceeded by *scire facias* to make the sheriff and his securities liable as bail, but failing in this, in consequence of a plea that the defendant was dead, he appealed and dismissed the *scire facias*, and in June, 1866, commenced suit on the sheriff's official bond for failure to take bail:

Held, That having elected to hold the sheriff and his securities liable as bail, the plaintiff is concluded by the remedy he has chosen, and cannot now resort to the official bond of the sheriff.

Bail. Sheriff's bond. Before T. W. ALEXANDER, an attorney at law, presiding by consent. Floyd Superior Court. July Term, 1872.

Mary A. Mosely, as administratrix *cum testamento annexo* upon the estate of Benjamin T. Mosely, deceased, brought debt against Emanuel Lyon, late sheriff of Floyd county, and his securities on his official bond, executed on February 16th, 1858, for \$10,000 00, alleging that said indebtedness accrued to the plaintiff on account of the defective execution by said Lyon of a bail process sued out against one Charles

Ross, during the pendency of a suit in the Superior Court of Polk county, in favor of said Benjamin T. Mosely, deceased, against said Ross.

The defendants pleaded as follows: 1st. *Nil debent*. 2d. That plaintiff, by order of the Superior Court of Polk county, caused these defendants to be made special bail for the said Charles Ross, who is now dead, so that these defendants cannot deliver him up, in discharge of their liability as his special bail, that they are therefore discharged from any legal obligation to the plaintiff. 3d. That Charles Ross is wholly insolvent, and no collection could be made from him by law; that nothing that was done or omitted to be done by the defendant, Emanuel Lyon, has caused, or can cause any loss or injury to said plaintiff; that if said Ross were now in life, and these defendants were to deliver him up, the said plaintiff could not be benefited thereby.

Plaintiff demurred to the second and third pleas. The demurrer was overruled, and the plaintiff excepted.

The evidence made the following case: On September 6th, 1858, Benjamin T. Mosely commenced suit to the next term of Polk Superior Court, against Charles Ross, on a joint and several note for \$3,511 75, dated January 29th, 1857, due December 25th, next thereafter, signed by Charles Ross and Jonas King. On August 8th, 1866, judgment was entered in said suit for \$3,300 00, principal debt, and \$1,991 21, interest. On October 23d, 1858, bail process was sued out, *pendente lite*, against said Ross, the sum sworn to being \$3,511 75, besides interest. On the process was the entry of the sheriff to the effect that he had arrested the defendant and taken bond according to law. The bond taken was signed by said Ross and Benjamin F. Bigelow as security, payable to said Bigelow, in the sum of \$7,030 00. At the October term, 1858, an order was taken directing that Emanuel Lyon and his securities shall be deemed and held special bail of the said Charles Ross; first, because the surety on the bail bond is in insolvent circumstances; secondly, because said bond is made payable to the said Benjamin F. Bigelow; thirdly, because the bond



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is taken in a sum more than double the amount sworn to, and and in a sum different from that indorsed on the back of the bail process.

Ca. sa. issued upon the aforesaid judgment, and a return of *non est inventus* was made on January 28th, 1867.

In October, 1859, Charles Ross was in Baltimore, on the eve of departing to the coast of Africa for the purpose of purchasing slaves. He had not been heard from since and was supposed to be dead. He left a wife and four children in Cedartown. His health had been very bad.

The *scire facias* sued out against Lyon and his securities was dismissed by the plaintiff before the commencement of this suit.

The evidence as to the solvency of Ross in 1868 was conflicting.

The testimony being closed, counsel for plaintiff stated to the Court that if it entertained the same opinion as was expressed in overruling the demurrer to the second and third pleas of defendant, it was unnecessary to argue the case to the jury. The Court stated that it would charge the jury, "that if they should believe from the evidence that the facts stated in the second and third pleas were true, they would have to find for the defendant; that if, on the motion of plaintiff's testator, then in life, defendants had been, by order of Court, made special bail, that defendants from that time were liable only as special bail for the said neglect of duty of the sheriff, and if Ross was dead, their liability as special bail ceased, and they could not be made liable by suit on the sheriff's bond for the same omission of duty for which they were made special bail."

In order that the case might be presented to the Supreme Court for review, upon the points aforesaid, the Court instructed the jury to return a verdict for the defendants, which they accordingly did.

Plaintiff excepted to the ruling of the Court upon the demurrer to the second and third pleas, and to the proposed charge, and now assigns the same as error.

Mosely vs. Lyon et al.

E. N. BROYLES; A. R. WRIGHT, for plaintiff in error.

WARREN AKIN, for defendants.

MCCAY, Judge.

This case presents a new question, but one which we think is a very plain one. The Judiciary Act of 1799, section 14, provides that "if the sheriff or other officer shall fail or neglect to take such bail, or the bail taken shall be deemed insufficient by the Court, on exceptions taken thereto and entry thereof made at the first term to which the said petition and process shall be returned, such sheriff or other officer and his and their securities in either of the cases shall be deemed and stand as special bail, and the plaintiff may proceed to judgment according to the provisions of this Act hereinafter mentioned."

In the case at bar, the plaintiff objected to the bail, the Court held the bail insufficient, and passed an order directing the sheriff and his securities to stand as special bail. The plaintiff proceeded to judgment, undertook to get a judgment final on the recognizance, and abandoned it, and now proposes to recover on the *official bond* for his damages.

We think he is concluded by his own selection to hold the sheriff liable as bail. He got by that order of the Court all his process sought, all the sheriff failed to furnish him, to-wit: a good bail bond. He got it, too, and accepted it of his own choice. It was not forced upon him. It was, too, a heavier obligation than exists by the official bond. The latter only holds the sheriff to the damages; the bail bond bound the sheriff to produce the body, and if he failed to do that, (the defendant living,) the sheriff was liable for the *debt*, and this though the defendant was insolvent and the damages, therefore, nothing. The bail bond, too, was a recognizance, a debt of record, and of higher dignity than even the official bond. At the first term of the Court after the failure of duty upon the part of the sheriff, the plaintiff had his choice of remedies.

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He had then the right to say, "The sheriff has *damaged* me. I will sue his official bond and recover for the wrong." He had, however, another right. He had the right to say damage or no damage. "I have a right to my *bail*; that was my demand, that the sheriff has failed to give me, and I insist upon the letter of my right." This plaintiff took the latter course. He demanded and he got the bail he sought for. When the sheriff and his securities became the bail, the plaintiff had *exactly* the demands of his process. What has he to complain of? He asked for bail and he got bail. We think the Judge was right.

Judgment affirmed.

ROBERT A. FORSYTH, plaintiff in error, *vs.* HENRY McCauley, defendant in error.

F. contracted in writing with M. to convey to him by deed certain described land in the State of Alabama for a stipulated price, in two payments. F. was to put a good substantial ten rail fence around the land, and stake and rider the same, was to have the privilege of all the timber on the land, after making said fence, and to have two years to remove the timber. M. was to have possession when the first payment was made, which was fixed at a given day, and was to leave and keep open a certain road, so that F. could have free access to the timber. Both parties signed the contract. F. filed his bill for specific performance, etc., alleging that he had made the fence around the land, was ready, willing, and offered to perform the balance of his contract, and that M. refused to pay any portion of the purchase money, or receive possession of the land:

Held, The Court erred in dismissing the bill for want of equity.

Equity. Specific performance. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1872.

Forsyth filed his bill against McCauley for specific performance, making the following case:

On October 1st, 1871, the complainant and defendant entered into a written contract as follows:

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“COLUMBUS, GEORGIA.—MUSCOGEE COUNTY.

“Know all men by these presents, that I have this day bargained and sold to Henry McCauley, of Lee county, Alabama, all that tract or parcel of land lying in Lee county, and State of Alabama, being the place I purchased of Haimun, and now hold his bond for titles to one hundred and seven-eighths acres. Now the terms of this agreement with McCauley are, that he, McCauley, is to have all the land in this tract, bounded as follows: on the east by the Summerville road, on the north by the land of Riolin and others, on the west by the land of Mindoz, formerly by James K. Redd, and on the south by the Academy lot and lands of Wise, and it is to be surveyed, and he is to pay me at the rate of eight dollars per acre for said land. I am to have the privilege of all the timber off the land, after putting a good substantial ten rail fence all around said land, and stake and rider the same. I am to have two years to remove the timber, and McCauley agrees to leave and keep open the road which I now travel through the land to the Summerville road, so that I can get at my timber without any trouble. The payments are to be made by McCauley as follows: \$400 00 on the first day of January, 1872, and the balance when titles are made perfect. McCauley is to have possession of all the land when the first payment is made.

(Signed)

“R. A. FORSYTH,
“HENRY McCAULEY.”

“Witnesses:

(Signed)

“R. W. MELFORD,
“J. W. BESSMAN.”

Complainant alleges that he has been put to great expense and trouble in erecting the fence around said land in accordance with the above agreement. That on January 1st, 1872, and since, he has been ready and willing, and so offered, to execute to defendant a perfect title to said land on the payment of the purchase money. That defendant has failed and refused to pay any part of said purchase money. Complain-

Forsyth vs. McCauley.

ant waives discovery, and prays that defendant may be required by a decree of the Court to specifically perform the contract aforesaid; that the writ of subpoena may issue.

The defendant demurred to the bill. The demurrer was sustained, and complainant excepted.

J. M. McNEIL; M. J. CRAWFORD, for plaintiff in error.

No appearance for defendant.

TRIPPE, Judge.

Where a contract for the sale of land is in writing, is certain and fair in all its parts, is for an adequate consideration, and capable of being performed, it is just as much a matter of course for a Court of equity to decree a specific performance of it as it is for a Court of law to give damages for the breach of a contract: 20 *Ga.*, 142; Hilliard on Vendors, 433, (2d edition.)

It is true that in the case of *Chance vs. Beall*, 20 *Georgia*, 142, the application for specific performance was made by the vendee. But this right must be reciprocal: Hilliard on Vendors, 433, 434, note (a.) It is further true that specific performance will not, in all cases, be decreed in favor of a vendor where there is only a parol contract, even though the contract be satisfactorily proved. In *Buckmaster vs. Harrass*, 7 *Vesey*, 341, the Master of the Rolls, Sir William Grant, says: "The vendor had no prejudice. He had done nothing to say the non-execution was a fraud on him. Had he let Barlow into possession, that would be an act by which he might have had a prejudice. I am aware there are cases that acts done by the defendant can be made a ground for compelling him to perform the agreement, but it is difficult to bring these cases to bear; for what do such acts amount to when there is no prejudice to the plaintiff? Only to proof of the existence of the agreement. But the Court does not profess to execute a parol agreement merely because it is satisfactorily proved." This is the rule in cases of parol contracts. Even in these, the law

goes far in decreeing a specific performance in favor of the vendor where there has been part performance and he has had a prejudice. But here there was a contract in writing, signed by both the parties, and the vendor had executed what he had agreed therein to do, to-wit: erected a ten rail fence around the whole of the land.

Section 3130 of the Code says specific performance will be decreed generally whenever the damages recoverable at law would not be an adequate compensation for the non-performance. This does not mean that, in no case, whether the contract be in parol or in writing, shall there be specific performance decreed if adequate compensation can be had by way of damages at law. In section 3132, in the case of personal property, the question is left to the jury in certain cases, whether they will decree damages or specific delivery. But in written contracts for land, where they are certain, fair and capable of being performed, equity will decree their performance: Story's Eq. Ju., sec. 746; Hilliard on Vendors, 421; *Ibid.*, 454.

This land is in the State of Alabama. The vendor has done much work under the contract, and changed the condition of the land, using largely of the timber in so doing; has, by the contract, the right to use certain timbers on the land for a term of years, with the right of way for that purpose; he cannot, under the provisions of the law of Georgia, recover judgment for the debt, file a deed and sell the land, and it would be inequitable to allow the defendant to repudiate the written agreement and compel the vendor to resort to law for damages.

Judgment reversed.

DANIEL F. GUNN *et al.*, plaintiffs in error, vs. HARRIET J. PATTISHAL, defendant in error.

1. To create a lien under the 1977th section of Irwin's Revised Code, and to have the same enforced upon the growing crops of farmers, the plaintiff must allege in his affidavit, that he is either a factor or a merchant, and that as such, he has furnished either provisions or com-

Gunn *et al.* vs. Pattishal.

mercial manures, or both, upon such terms as may have been agreed upon by the parties. (R.)

2. An execution based upon an affidavit not containing the aforesaid allegations, is void, and the plaintiff who directed the levy, and the sheriff who levied the same upon the property of defendant, were trespassers, and liable for damages as such. (R)
3. The verdict of the jury is not excessive. (R.)

Factor's lien. Trespass. New trial. Before Judge COLE. Houston Superior Court. May Term, 1872.

For the facts of this case, see the decision.

WARREN & GRICE; LANIER & ANDERSON, for plaintiffs in error.

DUNCAN & MILLER, by B. M. DAVIS, for defendant.

WARNER, Chief Justice.

This was an action of trespass brought by the plaintiff against the defendants to recover damages for the levy and seizure of two mules of the plaintiff under a pretended lien *fi. fa.* which was issued against the plaintiff's husband. On the trial of the case, the jury found a verdict for the plaintiff for the sum of \$100 00. A motion was made for a new trial on the several grounds set forth in the record, which was overruled, and the defendants excepted. The evidence in the record shows that the mules were the separate property of Mrs. Pattishal, and were used by her husband in making a crop on her land; that the sheriff declined to make the levy on the property until Gunn gave him a bond of indemnity; that the levy was made by the direction of Gunn, one of the defendants, and one witness proved the plaintiff was damaged \$100. In the view which we have taken of this case, it is not necessary to consider what would be the duty and liability of the sheriff in levying an execution, apparently regular and valid on the face thereof. It appears in the record, that on the 7th day of March, 1871, the plaintiff in the pretended lien *fi. fa.*, by his attorney at law, made an affidavit before the Ordinary

of Houston county that Pattishal was indebted to him in the sum of \$100 00, besides interest, on a draft given by said Pattishall on the plaintiff, Gunn, and accepted by him, said draft dated March 31st, 1870, as an advance on his growing crop of cotton, for the purpose of purchasing supplies to make said crop, and that he has a lien on the crop grown on the farm of said Pattishal in the year 1870, of cotton, corn, and on his stock of all kinds, for the payment of said draft, and all costs and counsel fees for collecting, and alleged a demand and refusal to pay the draft within twelve months from the time the same became due. On this affidavit being filed, the clerk of the Superior Court issued a *fi. fa.* against the defendant, Pattishal, in favor of the plaintiff, Gunn, reciting the facts, substantially, as set forth in the affidavit, and commanding the sheriff to levy and sell a sufficient amount of the crop of cotton and corn of 1870, made on his farm, and stock of all kinds of said defendant, to pay said draft, with interest and costs.

Since the passage of the Act of 1870, the affidavit is the only judgment required to authorize an execution for the enforcement of a factors' and merchants' lien upon the growing crops of farmers, for provisions and commercial manures furnished. If there was any law in existence at the time the affidavit was made in this case, which created a lien on the property of the defendant for the payment of the draft specified therein, or which authorized an execution to be issued for the enforcement of such lien against the property of the defendant, it has escaped our observation, much less against the separate property of the defendant's wife. The 1977th section of the Code clearly does not authorize any such proceeding to collect the plaintiff's draft; that section gives to factors and merchants only, a lien upon the growing crops of farmers for provisions and commercial manures furnished, and the affidavit in this case does not state that the plaintiff was either a factor or a merchant. To create a lien under this section of the Code, and have the same enforced as steamboat liens upon the growing crops of farmers, the plaintiff must allege in his affidavit

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that he is either a factor or a merchant, and that as such, he has furnished either provisions or commercial manures, or both, upon such terms as may have been agreed on by the parties. There being no law to authorize such a judgment creating a lien on the defendant's property, on the statement of facts contained in the plaintiff's affidavit, (conceding the affidavit to operate as a judgment under the lien law) the same was void, and the execution which issued thereon was void, as is apparent on the face thereof, and the plaintiff who directed the same to be levied, as well as the sheriff who levied it either on the property of the defendant, or on the separate property of his wife, were trespassers, and liable for damages as such. But it is said, the verdict for one hundred dollars is excessive in view of the facts of the case. Where parties undertake to seize the property of another without authority of law, they should expect to pay damages, and one of the witnesses swears the plaintiff was damaged the amount of the verdict. In view of the facts of this case, and the evidence contained in the record, this Court cannot say, under the law which governs this class of cases, that the verdict of the jury is excessive.

Let the judgment of the Court below be affirmed.

MARGARET DELAGAL, plaintiff in error, *vs.* W. J. WALLACE, administrator, defendant in error.

A warrant for forcible entry only, which shows upon the face that the entry was more than three years before the issuing of the warrant, and which contains no allegation or charge of forcible detainer, is demurrable as insufficient in law, and should be dismissed on motion, since the statute, in terms, provides that in no case shall the person in possession be turned out, if he has been three years in peaceable possession of the premises.

Forcible entry. Before Judge SCHLEY. McIntosh Superior Court. November Adjourned Term, 1872.

On January 15th, 1870, there came on for trial, before W. T. Thorpe, Esq., a Justice of the Peace for the twenty-second

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district, the case of W. J. Wallace, administrator, vs. Margaret DeLagal, upon the following warrant:

“STATE OF GEORGIA—McINTOSH COUNTY:

“*To Margaret DeLagal:*

“Whereas, on the 4th day of January, instant, W. J. Wallace, administrator, appeared before the undersigned and made oath that on or about the 1st day of January, 1867, you, the said Margaret DeLagal, did forcibly enter into two tracts or parcels of land * * * and violently, and without authority of law, took possession of said land, the same being the property of the heirs of Bright B. Harris, deceased, with menace, force and arms, and that you, the said Margaret DeLagal, still keep and retain possession of said lands, contrary to the laws of said State, the good order, peace and dignity thereof: Wherefore you are required to appear, etc.

“Witness my hand and official signature this 4th day of January, 1870.

(Signed)

“W. T. THORPE, J. P.” [L.S.]”

When the case was called for trial, the defendant moved to dismiss the warrant, because it showed upon its face that the defendant had been for three years in peaceable possession of the property in dispute. The motion was overruled and the defendant excepted.

The jury awarded the premises to the plaintiff. The defendant carried the case, by writ of *certiorari*, to the Superior Court, upon the above ground of exception. The Superior Court sustained the judgment of the magistrate, and the plaintiff in *certiorari* excepted.

W. B. GAULDEN; GEORGE S. THOMAS, for plaintiff in error.

No appearance for defendant.

Glanton *et al.* vs. Heard *et al.*

McCAY, Judge.

The record of this case is somewhat confused, but it plainly appears that the affidavit and the warrant both only claimed a "forcible entry," and that both of them stated this *forcible entry* to have taken place more than three years previous to the issuing of the writ. Not a word is said of any "forcible detainer." On the trial before the magistrate, the defendant moved, in the first instance, to dismiss the writ, because it appeared that the forcible entry charged took place more than three years, etc. The Court refused to dismiss, and required him to show that the entry did take place more than three years, etc. We think this was a fundamental error. The writ of forcible entry is a harsh process—a summary proceeding, and it ought, on its face, to make a case within the law. The statute says, in terms, that no one shall be dispossessed by this proceeding who has been three years in peaceable possession. In this case, the writ itself shows that the forcible entry does not come within the cases in which the magistrate may dispossess. Had there been in the writ any complaint of forcible detainer, it might have stood, but the statements of the writ are entirely consistent with a peaceful detention after the entry, more than three years before. It appears, too, by the proof, that the entry was under contract. Forcible detainer was the remedy, or both.

We think there was error in not sustaining the *certiorari*.
Judgment reversed.

J. H. GLANTON *et al.*, executors, plaintiffs in error, vs. HENRY
T. HEARD *et al.*, defendants in error.

Under section 3525 of the Code, it is necessary that the purchaser of real property should be in the possession of the same four years, before it can be discharged from the lien of a judgment against the person from whom he purchased.

Judgment. Lien. Purchaser. Before Judge WRIGHT.
Troup Superior Court. May Term, 1872.

An execution in favor of Abner Glanton, against Henry T. Heard, was levied upon a house and lot in the town of LaGrange, in Troup county, which was claimed by F. A. Frost. The issue thus formed was submitted to the Court upon the following agreed statement of facts:

On the 1st day of October, 1859, James M. Beall sold the property levied on to Henry T. Heard, by warranty deed; Heard went into possession at the close of that year and remained in such possession until the close of the year 1862; Heard conveyed said land, on the 9th day of July, 1862, to F. A. Frost by a like deed of warranty, who paid the market value of said property. Frost, the claimant, at the time of said purchase, spoke of judgments against this property, and asked an indemnity against them; whereupon, said Heard executed and delivered to said claimant a bond of indemnity, with sufficient security, which was accepted by said Frost and recorded with his deed, of the same date, in the clerk's office of said county. At the May term of the Superior Court of said county, in the year 1862, said Abner Glanton obtained a judgment against said Henry T. Heard for the sum of \$345 00, principal, and \$19 32, interest, up to May 22d, 1862, and the sum of \$13 25, costs, upon which execution issued on the 6th day of June, 1862, returnable to the following term of said Court, on which *fi. fa.* the following levy appears:

"I have this day levied the within *fi. fa.* upon the following property of the defendant, to-wit: The house and lot in the city of LaGrange, whereon Isaac H. Lane now resides, containing, in all, sixty acres, more or less, this September 2d, 1866.
I. O. TOWNS, Sheriff."

The affidavit showing the payment of taxes had been filed by the executors of the plaintiff in *fi. fa.*, in terms of the law, and that no objection was made to the levy of the *fi. fa.*, in

Glanton et al. vs. Heard et al.

any manner. The advertisement of the property was made in terms of the law for sale, on the first Tuesday in October, 1866, when claimant filed his claim.

The Court held that the property levied on was not liable to the execution, because more than four years had elapsed from the issue of said execution to the date of the levy. Whereupon, plaintiffs in *fi. fa.* excepted.

J. S. WALKER, by A. H. COX, for plaintiffs in error.

1st. The following authorities show section 3525 of the Code to be a statute of limitations: Section 3525, Irwin's R. Code; section 3, Acts General Assembly 1865-6, p. 242; Bouvier's Law Dic., Title "Limitations;" opinion of Warner, J., 39 Ga., 357.

2d. The 3d section Act 1865-6, constitutional: 7 Ga., 166; opinion of Brown, C. J., 39 Ga., 350; opinion of Warner, J., in same case; Garnett *vs.* Cordell, 43 Ga., 367; *Ibid.*, 538; Chapman *vs.* Akin, 39 Ga., 350; Sanders *et al. vs.* McAfee *et al.*, 42 Ga.

B. H. HILL & SONS, for defendants.

TRIPPE, Judge.

From the statement of facts agreed on by the parties, as it appears in the record, the claimant purchased the land from Heard after the judgment had been obtained against him, (Heard) and had not been in possession four years at the time the levy was made. Without referring to the point decided at this term in the case of *Akin vs. Freeman*, we simply say that, from the above facts, whether the statute on the question involved was or was not suspended, the purchaser did not have the possession of the property a sufficient time to have discharged it from the lien of the judgment.

Judgment reversed.

CHARLES T. FARRAR, plaintiff in error, vs. C. S. & S. BURT, defendants in error.

The weight of the evidence being in support of the verdict, and no error of law having been committed, it was error in the Court to order a new trial. (R.)

New trial. Before Judge McCUTCHEN. Whitfield Superior Court. July Adjourned Term, 1872.

Charles T. Farrar foreclosed a laborer's lien against Charles E. Marshall, for the sum of \$75 00. The execution issuing therefrom was levied upon a shingle mill and fixtures, as the property of the defendant. A claim was introduced by C. S. & S. Burt. The case was carried by appeal from the Justice's Court of the six hundred and twenty-seventh district to the Superior Court.

The facts of the case were as follows: The defendant in execution was indebted to the plaintiff in the amount of the execution for labor performed as a sawyer. He was also indebted to the claimants in the sum of \$100 00 prior to the levy of the execution. On February 12th, 1872, he wrote to their attorney, offering to deliver them the property levied on in full of the debt, or to retain the property, allowing the title to remain in them, as security for their debt. On February 25th, 1872, the attorney went to the mill to take possession of the property, but simultaneously with his arrival Marshall left. He did not remove the machine and the fixtures. On March 1st, 1872, he received a letter from Marshall, in which he stated there was no claim on the property, and there could be none, as his last letter transferred the title to claimants. Also, that claimants might do what they pleased with the property as he had no claim on it. Also, that he would sign any instruments that were necessary, and that they ought to date from February 12th, 1872. Sometime between the 7th and 10th of March, 1872, claimants' agent went to the mill to ship the property, but did not succeed in getting wagons to haul it to the depot. About the 20th of the same month

Farrar vs. Burt.

he went to the mill for the same purpose, but found the machinery levied on under the execution of the plaintiff.

The jury found the property subject. The claimants moved for a new trial upon the following grounds:

1st. Because the verdict was contrary to the law and the evidence.

2d. Because the Court erred in overruling the motion of claimants to dismiss the appeal, because the affidavit of plaintiff *in forma pauperis*, to secure the appeal, was made before the Ordinary of the county, who was acting as his counsel.

A new trial was ordered, and the plaintiff excepted.

W. H. BROOKER; D. A. WALKER, for plaintiff in error.

T. R. JONES; JOHNSON & McCAMY, for defendants.

WARNER, Chief Justice.

The plaintiff foreclosed a laborer's lien against the defendant, which was levied on a shingle machine as the property of the defendant, which was claimed by C. S. & S. Burt as their property. On the trial of the claim case the jury found the property subject. A motion was made for a new trial on the several grounds stated therein, which was granted by the Court, and the plaintiff excepted. There is no evidence in the record that Brooke, the Ordinary, before whom the pauper affidavit was made to obtain the appeal, was acting as counsel for the plaintiff *at the time it was made*. In our judgment, there was sufficient evidence before the jury to authorize them to find the property subject, under the charge of the Court. The weight of the evidence, we think, is in favor of the verdict, that the title to the machine was in the defendant, and had never passed out of him to the claimants when the levy was made thereon.

Let the judgment of the Court below be reversed.

The Brunswick and Albany R. R. Company *vs.* The State, etc.

THE BRUNSWICK AND ALBANY RAILROAD COMPANY, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

LYON, McLENDON & COMPANY, plaintiffs in error, *vs.* HENRY CLEWS & COMPANY, defendants in error.

1. When the Governor of this State, with other creditors of the Brunswick and Albany Railroad Company filed a creditor's bill against the company, alleging that the company was insolvent, and praying the appointment of a receiver, the bill charging that the State of Georgia was interested in the assets, in so far that it was stated that certain bonds of the company were in circulation, purporting to have upon them the State's indorsement, and praying on the part of the State, that the receiver might be appointed and the property preserved until the liability of the State should be ascertained :

Held, That the Legislature having, by law, declared that the indorsement of the bonds was illegal and void, it was not error in the Chancellor, on motion of the Governor, to dismiss the State, as a party plaintiff to the bill, even if the receiver had been appointed and had possession of the effects of the company under the order of the Court.

2. Where, during the progress of a cause in equity, there was a reference of accounts to a master, who reported, and his report was excepted to, on matters of fact and of law, and before any final action on the exceptions, the Judge permitted one of the parties to withdraw his account and substitute another :

Held, That this was a mere interlocutory order, and not such a judgment as can be brought to this Court before a final judgment in the cause.

State. Party. Receiver. Practice in the Supreme Court. Practice in the Superior Court. Bill of exceptions. Before Judge SESSIONS. Glynn Superior Court. May Adjourned Term, 1872.

Rufus B. Bullock, as Governor of the State of Georgia, for said State, Lyon, McLendon & Company, and others, creditors of, and the city of Brunswick and others, stockholders in the Brunswick and Albany Railroad Company, suing in behalf of themselves and others standing in similar respective relations to the defendant, filed their bill against the Brunswick and Albany Railroad Company, praying an injunction and the appointment of a receiver.

The Brunswick and Albany R. R. Company *vs.* The State, etc.

The case made by the bill, so far as it concerns the State of Georgia, was as follows :

The said State, in order to secure the construction of the road by the defendant, by its constitutional authorities, passed two Acts, by the first of which, under certain conditions, it obligated itself to indorse the bonds of said company for the sum of \$15,000 00 per mile, and by the second of which said indorsement was extended to an additional \$8,000 00 per mile. The road has been completed a distance of one hundred and seventy miles, and the bonds of said defendant have been indorsed by the State to the amount of \$4,910,000 00. These bonds have been negotiated or hypothecated to various persons, some of whom are unknown to complainants, and whilst they do not admit the legality of their issue or negotiation, yet they are informed and believe that the present holders thereof will seek to render the State responsible on said indorsement. For the security of the State from liability, the defendant executed a deed of trust, conveying all its property, real and personal, to said State, and the Governor has seized said property in order to compel the defendant to pay its indebtedness, and has appointed John Screven receiver. But the counsel of numerous creditors of said road, holding executions against it, have advised their clients that such seizure is invalid, and will not be regarded when the day of sale, under such executions, arrives.

The bill was sanctioned, and John Screven was appointed receiver by the Chancellor, and took possession of all of the property of said defendant. Pending the litigation, an Act of the General Assembly was passed declaring that the aforesaid indorsement was not binding upon the State.

At the May term, 1872, of Glynn Superior Court, the counsel for the State moved to strike the Governor's name from said bill, thus withdrawing the State from the litigation. This motion was resisted by the defendant upon the following grounds, to-wit:

1st. Because the Governor forcibly seized the Brunswick

and Albany Railroad with its equipments, and placed them in the hands of a receiver.

2d. Because at the instance of the Governor this bill was filed, and upon the issues therein contained the defendant has joined in the pleadings, appeared before the master in chancery, and the appointment of a receiver by this Court was predicated upon the seizure and appointment by the Governor.

3d. Because the action of the Legislature of 1872 does not change, in law, the *status* of the case made, for their act was an exercise of the judicial power, and the question was before a Court, to the jurisdiction of which it had been voluntarily submitted.

4th. Because the only right the Governor could exercise would be to dismiss the bill and restore the property forcibly and illegally taken from the defendant back to those who are its owners and custodians, and who have done no act to forfeit their right to it without a judicial hearing.

The objections were overruled and the motion sustained. Whereupon, the defendant excepted.

In the further progress of the case, Henry Clews & Company, a creditor of the defendant, who had been made a party complainant, moved to withdraw a claim of \$2,844,000 00, which had been before the auditor appointed by the Chancellor, and to substitute therefor a claim for \$562,000 00, and to go before the auditor with proof of the same. This motion was resisted by Lyon, McLendon & Company, upon the ground that it was contrary to the law and the practice of the Court to allow a claim to be withdrawn after it had been passed upon by the auditor.

The objections were overruled and the motion allowed. Whereupon, Lyon, McLendon & Company excepted.

Error was assigned by the Brunswick & Albany Railroad Company upon the first exception, and by Lyon, McLendon & Company upon the second.

O. A. LOCHRANE, for the Brunswick & Albany Railroad Company, and for Henry Clews & Company.

The Brunswick and Albany R. R. Company vs. The State, etc.

LANIER & ANDERSON; HINES & HOBBS, for the State,
and for Lyon, McLendon & Company.

McCAY, Judge.

1. We do not care to discuss the question so elaborately argued by the plaintiff in error as to the liability of the State on the indorsement of the bonds, nor as to the duty of the Treasurer or Governor to permit the bondholders to use the name of one or the other of these officers to enforce the trusts in the mortgage or trust deed. The Governor only appears in this bill for a special purpose. He asks the interposition of the Court to preserve the property until it can be ascertained whether the State is liable on the indorsement. For this reason, he joins with the other plaintiffs in the prayer of the bill. There was no answer, no cross-bill, no plea. There has occurred nothing, as appears by the pleadings, to show any right to a decree against the State, or any claim of such a decree. Can it be contended that any other of these plaintiffs would not, in the present state of this cause, have the right to dismiss himself from this bill? The statute, in terms, declares that any complainant, either in term time or vacation, may dismiss his bill, so that he does not thereby prejudice any right of the defendant. What right of the defendant is prejudiced? He sets up no right, not having pleaded or filed any answer. The fact that a receiver has been appointed and the property taken out of defendant's hands may be a wrong, but any right of defendant arising from that wrong is not in the least affected by permitting the State to go out of the litigation. The interest of the State in the bill is gone, since the Legislature has declared the State is not interested. The Governor is only the agent of the State, and if the State has no interest, it is not only his right, but his duty, to withdraw. The State cannot, against the will of the Legislature, be compelled to submit its liabilities to its own Courts. We do not express any opinion on any of the rights of any of these parties. We simply say that, as the litigation stood at the time of this order, it was not error to grant it.

Judgment affirmed.

2. On the other branch of this bill of exceptions, whilst we do not affirm the judgment, nor the contrary, we think it a mere interlocutory order, and we will not entertain a writ of error founded on it. Whilst the cause is still pending, clearly the judgment is not a final one, nor would it have been final if the permission granted had been denied. The exceptions to the report were undisposed of, and the whole matter is still pending in the Court below. The master's report, as it stood, even if unexcepted to, was not final, since it is, of itself, very uncertain and indefinite. It would be an endless task if this Court were to hear bills of exceptions in cases like this. In a cause like the present, there might be fifty of them before the final hearing.

WILLIAM G. WOOLFOLK, administrator and executor, plaintiff in error, vs. JOSEPH KYLE, defendant in error.

1. A judgment against an executor or administrator, where there is no plea, that the sum recovered "be levied of the goods and chattels, lands and tenements of the testator or intestate," is sufficient, under section 3515, Revised Code, without adding the words "in the hands of, etc., to be administered." These last words are not required by said section.
2. When the maker and indorser of a promissory note are dead, and the administrator of the maker is also executor of the indorser, and suit is brought on the note against him in both capacities, though the judgment does not specify the relation of maker and indorser, it is good against him, at least, so far as he is the representative of the maker, and if levy be made accordingly, he cannot arrest it on that ground by affidavit of illegality.

Illegality. Judgment. Indorser. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1872.

Kyle brought complaint against William G. Woolfolk as administrator upon the estate of Joseph W. Woolfolk, deceased, and as executor of John Woolfolk, deceased, upon a promissory note made by Joseph W. Woolfolk on January 1st,

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1861, for \$2,047 92, payable twelve months after date to J. Kyle & Company, or bearer, and indorsed by John Woolfolk. The jury returned a verdict for the plaintiff for the full amount of the note, with interest and costs. Judgment was entered as follows:

“Whereupon, it is considered by the Court that the plaintiff do recover of the defendant, W. G. Woolfolk, the sum of \$2,047 92, principal debt, and the further sum of \$776 47, interest, and the further sum of \$14 70, costs of suit in this behalf laid out and expended, the whole to be levied of the goods and chattels, lands and tenements of Joseph W. Woolfolk, deceased, and John Woolfolk, deceased.”

Execution was issued in accordance with the judgment, and levied upon certain lands as the property of Joseph W. Woolfolk, deceased. To which proceeding William G. Woolfolk, as administrator and executor, interposed an affidavit of illegality, upon the ground that no valid judgment had been rendered in the case, and that the execution issued upon said pretended judgment was null and void.

When the issue thus formed was called for trial, counsel for defendant moved that the judgment be quashed, on the grounds stated in the affidavit of illegality. The motion was overruled and the execution ordered to proceed. Whereupon defendant excepted.

BLANDFORD & CRAWFORD, for plaintiff in error.

PEABODY & BRANNON, for defendant.

TRIPPE, Judge.

1. Whilst it would have been more in accordance with the usual form to have added to the judgment the words, “in the hands of, etc., to be administered,” yet those words are not required by section 3515 of the Code. It says, that in such a case as this “the judgment must be *de bonis testatoris*.” The law presumes the assets to be in the hands of the representative, when no plea is filed and judgment is rendered

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against him. It is only in cases where a plea of *plene administravit* is filed and sustained, that it is necessary to specify in the verdict and judgment that the debt shall be levied of the goods and chattels, etc., *quando acciderint*. In the first case, by the verdict and judgment, the assets are in the hands of the administrator by presumption of law; in the latter, the verdict and judgment show that there are no assets in his hands.

2. Section 3514 of the Code, requiring the relation of the parties under the contract sued on, where there are sureties or indorsers, to be designated in the judgment, was intended for the benefit of the surety or indorser. If such surety or indorser discharge the judgment, he could have the control of it for his reimbursement out of the maker or principal, without delay in procuring an order of Court. A compliance or non-compliance with this, cannot benefit or injure the principal. In this case, the levy is made on the property of the principal. It can make no difference with him whether the indorser is designated as such or not. Had this been a case of a levy on the property of the indorser, and the point been made by him, it would have presented a different question.

Judgment affirmed.

THE BARNESVILLE MANUFACTURING COMPANY, plaintiff
in error, vs. JOHN G. CALDWELL, defendant in error.

Where exceptions to an award did not contain all the evidence submitted to the consideration of the arbitrators, a demurrer thereto was properly sustained. (R.)

Award. Exceptions. Before Judge GIBSON. McDuffie Superior Court. October Term, 1872.

The seventh ground of exception to the award was submitted to a jury, and a verdict returned against the objection. The remaining facts are fully reported in the decision.

The Barnesville Manufacturing Company vs. Caldwell.

CASEY & HUGHES; W. M. & M. P. REESE, by FRANK H. MILLER, for plaintiff in error.

C. S. DuBOSE; H. C. RENEY, by brief, for defendant.

WARNER, Chief Justice.

A motion was made in the Court below to make an award of arbitrators the judgment of the Court, to which sundry exceptions were filed. The exceptions were demurred to as being insufficient in law to set aside the award. The Court sustained the demurrer as to all the grounds except one, and that one being submitted to the jury, they returned a verdict sustaining the award. Exceptions were filed to the judgment of the Court sustaining the demurrer to the grounds taken to set aside the award. It appears from the record that certain matters of difference existed between Caldwell and the other members of the Barnesville Manufacturing Company; that the parties agreed, in writing, to submit the matters in controversy between them touching their matters of settlement, involving the correctness and incorrectness of their different accounts and claims, to the arbitrament of three arbitrators, who, after examining several witnesses and investigating the various documentary testimony submitted to them, made their award. On examining the several grounds of exception taken to the award, as disclosed by the record, we find no error in the judgment of the Court in sustaining the demurrer thereto, according to the previous rulings of this Court in similar cases. The submission included the settlement involving the correctness or incorrectness of the different accounts and *claims* of the parties. What was the nature of their different accounts and claims did not appear to the Court, because the evidence had before the arbitrators was not set forth, and that was a fatal defect in the pleading to set aside the award, which was demurrable for that cause. The office of a demurrer is not to deny the *truth*, but only the *legal sufficiency* of the allegations demurred to. It, therefore, admits all such facts

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alleged by the adverse party as are *well pleaded*, and refers the question of law to the Court: *Sharp & Brown vs. Loyless*, 39 *Georgia Reports*, 12. Excepting the seventh ground of objection to the award, there was nothing alleged against it which, according to the ruling of this Court in *Sharp & Brown vs. Loyless*, before cited, *Anderson vs. Taylor*, 41 *Georgia Reports*, 10; *Akridge vs. Patillo*, 44 *Ibid.*, 585, and other cases, would have authorized the Court to have set aside the award in this case.

Let the judgment of the Court below be affirmed.

THE ATLANTIC AND GULF RAILROAD COMPANY, plaintiff
in error, vs. THOMAS J. FULLER, trustee, defendant in error.

1. Since 1st of January, 1863, under section 2960 of our Revised Code, the owner of land may maintain an action for a trespass thereupon, even though he have not actual possession of the same.
2. An action of trespass *quare clausum fregit*, which sets forth that the defendant had, without authority of law and without consent of the plaintiff, built a railroad upon the plaintiff's land and had used and occupied it for a right of way since 1858 (more than seven years) is not demurrable, on the ground that on its face it shows the plaintiff's right to be barred by the statute of limitations.
3. The owner of land taken by a railroad company for right of way is not debarred of his action for trespass, because the charter authorizes the company, in a particular way, to so appropriate the land, unless the company have pursued the mode pointed out, and thus acquired the legal right.

Trespass. Railroads. Statute of limitations. Charter.
Before Judge SESSIONS. Pierce Superior Court. September
Term, 1872.

On August 26th 1871, Fuller, as trustee, commenced suit against the Atlantic and Gulf Railroad Company, upon the following declaration: "The petition of T. J. Fuller, as trustee, sheweth, that he has sustained great injury and damage from the Atlantic and Gulf Railroad Company, for that the said

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defendant in the year 1858, without the consent of petitioner or authority of law, entered upon, built their road and ran their engines and cars through and across lot of land number two hundred and eighty-five, in the fourth district of said county, the property of petitioner, and has continued to appropriate and use said lot of land for the purposes aforesaid, from the aforesaid year to the present time, to the damage of your petitioner \$1,000 00. Wherefore," etc.

Counsel for the defendant moved to dismiss the action upon the following grounds :

1st. Because the declaration showed upon its face that plaintiff's claim was barred by the statute of limitations.

2d. Because the charter provides the mode of suit in cases arising from the location of the right of way by the defendant, and, therefore, trespass was not the proper remedy.

The motion was overruled and the defendant excepted.

The case was submitted to a jury, who returned a verdict in favor of the plaintiff.

The defendant assigns error upon the above ground of exception.

J. C. NICHOLS, by Z. D. HARRISON, for plaintiff in error.

No appearance for defendant.

McCAY, Judge.

1. Under our Code, section 2965, an owner of land may sue a trespasser, even if the owner has never had possession. This is a change of the common law, but it is a positive legislative provision, and is required by the circumstances of the country.

2. By the demurrer, the charges of the declaration are admitted. In this case, it admits that the defendant, without authority, and against plaintiff's consent, took, etc. The seven years bar is based upon presumption of a grant; this, in terms, admits there was no right, or claim of right. Title by prescription must be based on, at least, a claim of right. We

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think, therefore, the plaintiff's declaration was not demurrable. The statute of limitations, as against a trespass, should have been pleaded. The recovery could go no further back than the time fixed by law for an action of trespass.

3. There is nothing in the charter denying to land-owners this right of action for trespass which he has at common law. If the railroad company desired to use its privileges under the charter, it was its right and duty to do so. But that mode of proceeding is not obligatory on the owner. The company may force him to that course by moving itself; but until that be done, the company is a trespasser, if the land owner so pleases to elect.

Judgment affirmed.

WILLIAM A. SMITH, plaintiff in error, vs. MOSES SUMMERLIN, defendant in error.

1. Whenever the bill of exceptions contains a mere recital of the grounds taken in a motion for a new trial, and the judgment of the Court below is a general judgment overruling the motion, and nothing appears in the motion, judgment or bill of exceptions verifying the grounds as true, no assignment of error can be founded on such grounds so as to entitle them to be heard in this Court; and the more especially is this so, where the pleadings in the case do not authorize the issues raised in such grounds.
2. In 42 *Georgia Reports*, 226, the Court held that when a contract was made by a freedman and a landlord to make a crop for one year, by which the landlord was to furnish the land and stock, and the freedman to work the same, and to receive one-half of the crop made thereon, such a contract did not make them partners:
Held, That this case comes within said decision.
3. There being sufficient evidence to authorize the verdict in this case, and the Court below refusing a new trial, this Court will not interfere on that ground.

New trial. Practice in the Supreme Court. Partnership. Before Judge BUCHANAN. Coweta Superior Court. September Term, 1872.

Smith vs. Summerlin.

Moses Summerlin commenced proceedings on a laborer's lien against William A. Smith for the sum of \$500 00. The defendant filed an affidavit of illegality, upon the following grounds, to-wit: "That plaintiff in *fi. fa.* failed to perform his contract upon which said *fi. fa.* was founded; that this deponent, upon a fair settlement with plaintiff, does not owe him anything."

The following evidence was introduced upon the trial:

The plaintiff testified as follows: Worked for defendant on his farm during the year 1870; cultivated seventy-five or eighty acres of land—partly in corn and partly in cotton; in the cultivation of the land, there were engaged plaintiff and five or six hands employed by him; the land produced eight bales of cotton, weighing from four hundred and fifty to five hundred pounds, one hundred and forty barrels of corn, and twenty-three hundred bundles of fodder, weighing from one and a quarter to one and a half pounds each; one half of said produce belonged to plaintiff and the other half to defendant; the defendant has kept all the produce except the shucks; plaintiff demanded his proportion, but defendant refused to deliver; plaintiff owed the defendant, as near as he knew, \$60 00, for provisions furnished during the year 1870; plaintiff cultivated the land in a farmer-like manner, except for about three weeks, when it fell back a little; this was caused by the death of plaintiff's wife; ploughed the corn and cotton three times; a portion of the corn made was destroyed by the stock of defendant; defendant turned eleven head of horses and mules into the field worked by the plaintiff; said stock and a number of cows and other cattle ran upon said field constantly for two months.

Toby Summerlin, the son of the plaintiff, corroborated his father's testimony.

M. Saloshin testified, that cotton was worth, in December, 1870, from twelve and a half to fourteen cents; corn was worth from \$1 00 to \$1 10 per bushel.

Foster Arnold corroborated the preceding witness, and tes-

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tified further, that fodder was worth from \$1 25 to \$1 50 per hundred.

The plaintiff introduced the written contract between him and defendant, as follows :

“COWETA COUNTY—STATE OF GEORGIA.

“Know all men by these presents, that I, William A. Smith, have contracted with Moses Summerlin this day. I, William A. Smith, do hereby agree to furnish (stock) three mules and feed for the mules, and (75) seventy-five acres of land, to be laid off by the said W. A. Smith, a certain portion to be planted in corn and a portion in cotton, as directed by the said W. A. Smith, being left to his discretion; he also agrees to furnish a team and wagon for gathering and hauling on the farm and tools necessary to prepare and cultivate the land. Moses Summerlin (colored) agrees to furnish the hands and do all the labor necessary to making safe and cultivating well the said number of acres of land, and to be gathered in time, corn to be gathered and hauled up to Mr. Smith's and shucked and measured; Summerlin (freedman) to have one-half and Smith the other, and shucks the same way. The cotton to be hauled to my gin and ginned at the customary rates of ginning, then hauled to town, and a division of the cotton or money, as we may think proper, the hauling to be equally paid by both. The bacon to be furnished to Mose at (26) twenty-six cents per pound. Directions in cultivating to be given by W. A. Smith. This agreement agreed and entered into this January 22d, 1870.

(Signed)

“W. A. SMITH,

“MOSE ^{his} ~~X~~ SUMMERLIN.
mark.

Test: “J. N. VINEYARD,
“G. W. PENN.”

“P. S. All tools to be returned or paid for by the twenty-fifth day of December, 1870, this agreed upon.

(Signed)

“W. A. SMITH,

[Stamp]

“MOSE ^{his} ~~X~~ SUMMERLIN.”
mark.

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The following evidence was introduced for the defendant:

Arthur Latimore, sworn: Saw the land cultivated by plaintiff in January, 1871; did not see it in 1870; a portion is bottom and the balance upland. The crop was not cultivated well. Saw a portion of the cotton raised; it was dirty and wet; had to be moved in the gin house and scattered to dry before it could be ginned; while in a heap it was so hot that witness could hardly hold his hand in it; judges that the land was not well cultivated from the size of the stalks, from the fact that bamboo briars had grown up in some parts of the cotton field, and from the quantity of grass in the corn. There were about one thousand good bundles of fodder; the balance was the same as worthless; it had been injured by the stock tearing it out of the stacks and by being badly put up.

The defendant testified as follows: Furnished the stock and feed according to contract, but plaintiff did not cultivate the land in a farmerlike manner. He plowed the corn twice after it was up, with an interval of five weeks. The cotton was not more than one-half cultivated. Defendant furnished to plaintiff provisions and other things to the amount of \$127 00. Defendant did the ginning and paid for ties and bagging, which, together with hauling the cotton to market, was worth \$45 00. The cotton was damaged on account of not having been picked in time. It was beat out of the bolls by rain and became black and dirty. It was thrown into heaps in the field and rained upon. There were only six light bales made, aggregating two thousand seven hundred and fifty pounds, and the highest offer made for them in the markets of Sharpsburg and Newnan was eight cents per pound. There were two hundred and sixty bushels of corn made. Twelve acres of the twenty-four cultivated in corn was as good bottom as there is in the country, and ought to have made, under proper cultivation, fifty bushels to the acre. The stock did not destroy more than about twelve or fifteen bushels of corn. The defendant was damaged by the manner in which the plaintiff cultivated the land at least the amount of his (plaintiff's) interest in the crop. Never refused to let

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plaintiff have a wagon to haul up corn. Plaintiff applied for a wagon on one occasion to haul cotton when defendant's wagon was engaged, and he told plaintiff he could get it the next day. The plaintiff and his son applied for a wagon twice to haul up corn; replied that he would have the corn hauled when it suited him. The corn was gathered by the middle of October and the cotton by the middle of December. The plaintiff commenced to pull corn before notifying defendant; told him to stop and he obeyed. Defendant had the corn which was made hauled to his crib, except the first gathering. There were sixty bushels of this lot, of which the plaintiff got his half. The second gathering amounted to two hundred bushels. Plaintiff did demand one-half of the corn, but never did demand any portion of the cotton; he left before the same was ginned or even hauled to the gin. Never told the plaintiff to leave his yard, and that if he came back he would kill him.

Plaintiff recalled: Asked defendant three times for a wagon to haul cotton, and was refused. Asked him several times for a wagon to haul corn, and was refused. Defendant only came once to the field where the hands were picking. Defendant ordered plaintiff out of the yard, and told him that if he came back he (defendant) would kill him. The reason that defendant threatened to shoot him was because the plaintiff applied to him to divide the corn after the same was hauled up into the lot. This was the reason why plaintiff failed to help shuck and crib the corn.

Toby Summerlyn corroborated plaintiff in his testimony as to the refusal of defendant to furnish a wagon.

R. M. Hackney, sworn: Witness, as sheriff, levied the lien *fi. fa.* in this writ; defendant showed to him two different cribs of corn, and said it was the corn raised by the plaintiff. Some of the corn seemed to have been bitten; some was as fine as witness ever saw. Noticed around the cribs a pile or two of rotten and short corn.

The jury returned a verdict for the plaintiff for \$113 18.

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Whereupon the defendant moved for a new trial upon several grounds, only two of which it is necessary to set forth:

1st. Because the Court erred in refusing to dismiss plaintiff's case, on the ground that the defendant and plaintiff were partners, and because the plaintiff was not a laborer, and was therefore not entitled to a laborer's lien.

2d. Because the verdict was contrary to the evidence.

The motion was overruled, and the defendant excepted upon each of the grounds therein taken.

There was nothing in the record or bill of exceptions which identified the grounds taken in the motion for a new trial, which were also the grounds of exception, as being true.

W. F. WRIGHT; W. A. TURNER, for plaintiff in error.

J. B. S. DAVIS, for defendant.

TRIPPE, Judge.

1. It has been frequently decided by this Court that the grounds recited in a motion for a new trial must be verified either in the motion itself, or in the bill of exceptions, or elsewhere in the record, or certificate of the Judge, as being true, especially if the decision of the Court on the motion is a general judgment, simply overruling or refusing the same. The reason of this rule is made more obvious where the issues that are presented in such grounds are not authorized by the pleadings.

2. We think that the decision in *Holloway vs. Brinkley*, 42 Georgia, 226, governs this case.

3. Nor was the verdict so unsupported by evidence as to call for the interference of this Court in controlling the discretion of the Court below in refusing a new trial on that ground.

Judgment affirmed.

Carr vs. Benedict, Hall & Company et al.

JOSEPH P. CARR, plaintiff in error, *vs.* BENEDICT, HALL & COMPANY *et al.*, defendants in error.

Where an attorney at law, in response to a summons of garnishment issued at the instance of a judgment creditor, answers that he has a certain sum of money in his hands belonging to the defendant, which, before he was served with such summons, he had decided to appropriate towards the satisfaction of other judgments than that upon which the process of garnishment issued, but had not actually done so, because he was awaiting the consent or refusal of the defendant to such action, it was not error in the Court to order the fund paid to the oldest execution, after allowing reasonable attorney's fees and costs to the diligent creditors bringing the fund into Court. (R.)

Garnishment. Attorney. Fees. Before Judge GIBSON.
Richmond Superior Court. January Term, 1872.

For the facts of this case, see the decision.

JOSEPH P. CARR, for plaintiff in error.

FRANK H. MILLER, for defendants.

WARNER, Chief Justice.

Benedict, Hall & Company, judgment creditors of Foster Blodgett, garnisheed Joseph P. Carr, Esq., an attorney at law, who answered that he had in his hands \$564 55 belonging to the defendant; the Court ordered the money in the hands of the garnishee to be paid into Court, to be disposed of as the Court might thereafter direct. At a subsequent day, when the motion to dispose of the money came on to be heard, there were sundry executions, in favor of different plaintiffs, against the defendant, Blodgett, before the Court, claiming the money. The garnishee stated in his place to the Court that before the summons of garnishment was served on him, that he had decided to appropriate the money in his hands to the payment of judgments against the defendant in favor of Picquet, Bigelow and Emmerson, but had not actually done so, because he was waiting the consent to or refusal of such appropriation by the defendant. The Court ordered the money in Court to be paid

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to the oldest execution before it, after paying to the execution in favor of Benedict, Hall & Company, the diligent creditors bringing the money into Court, the sum of \$185 39, the same being the amount of fees and costs in obtaining said judgment. Whereupon, exceptions were filed to the decision of the Court. We find no error in the judgment distributing the money paid into Court by the garnishee, under its order, on the statement of facts disclosed in the record.

Let the judgment of the Court below be affirmed.

THE SAVANNAH, GRIFFIN AND NORTH ALABAMA RAILROAD COMPANY, plaintiff in error, *vs.* WILCOX, GIBBS & COMPANY, defendants in error.

1. The liability of a common carrier ceases if the goods are taken from his possession by *legal* process.
2. A possessory warrant, which states that certain cotton having been lately in the peaceable and legally-acquired possession of A B, has been illegally taken out of his possession by some person unknown and placed on the cars of the Griffin and North Alabama Railroad Company, and directing the seizure of the property and the arrest of said unknown person when found, is not a void warrant. It is a warrant in which A B is the complainant, the railroad company the defendant, and it sufficiently charges the property to be in the possession of the railroad company, without lawful warrant. The order to arrest the unknown person, and the failure to direct the arrest of the company, do not make it void, if the property be, in fact, taken.
3. It is not *the duty* of a common carrier to keep his doors locked and to refuse entrance to a sheriff, who comes to seize property in the possession of the carrier, if the sheriff have legal process.
4. When goods delivered to a common carrier for transportation were seized by legal process and taken out of his possession by the sheriff, and the carrier forthwith gave notice to the consignor and consignee, and they made no reply and took no further notice of the proceedings: *Held*, That the carrier had a right to presume they had abandoned the property, as subject to the legal process which had seized it.

Common carriers. Railroads. Possessory warrant. Before Judge BUCHANAN. Coweta Superior Court. September Term, 1872.

Wilcox, Gibbs & Company brought complaint against the Savannah, Griffin and North Alabama Railroad Company, alleging that on November 20th, 1871, at Newnan, in the State of Georgia, plaintiffs delivered to the defendant two bales of cotton, of the value of \$500 00, to be transported to the city of Savannah, there to be delivered to the plaintiff; that the defendant had failed to transport said cotton to Savannah and to deliver them according to its contract. The defendant pleaded the general issue, and that the cotton had been taken out of its possession by legal process.

The evidence made the following case: On the day alleged in the declaration, the cotton was delivered to the defendant by James E. Jones, as the agent for plaintiffs. On the next day it was sent forward to Savannah, and on the day succeeding this, the shipper, Jones, was informed that the cotton had been seized at Griffin, Georgia, by the deputy sheriff of Spalding county, under legal process, and had been taken from the possession of defendant. Notice of these facts was given to the plaintiffs at Savannah, some time between November 28th and December 8th, 1871. On the 21st of November, J. T. Mann, a deputy sheriff of Spalding county, found the cotton in the possession of C. H. White, an agent of defendant, at Griffin, Georgia, and seized it under the following affidavit and warrant:

“STATE OF GEORGIA—SPALDING COUNTY:

“Personally appeared James S. Boynton, one of the law firm of Boynton & Dismuke, attorneys for W. B. Wilkinson, and being sworn says, from information and belief, that in Coweta county, on the 20th day of November, 1871, as deponent is advised and believes, some party unknown to deponent, took and carried away from the peaceable and lawfully acquired possession of said W. B. Wilkinson, two bales of cotton marked O, of the value of \$125 00, under some pretended claim or claims and without lawful warrant or authority, as this deponent is informed and believes, and that said W. B. Wilkinson *bona fide* claims a title to and the posses-

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sion of said cotton; and that said unknown party has shipped, or caused said cotton to be shipped on the train from Newnan to Griffin, and is now, as deponent is informed, on the train of the Savannah, Griffin and North Alabama Railroad, in Griffin, Spalding county. Wherefore deponent prays a warrant, in terms of the law, in such cases.

(Signed) "JAMES S. BOYNTON.

Sworn to and subscribed before me,

this November 21st, 1871.

"WM. M. CLINES, *ex officio* J. P."

The warrant set forth the above affidavit, and continued as follows: "Wherefore you are commanded and authorized to apprehend said unknown party when found and identified, and seize and take possession of and retain in your custody said two bales of cotton, and bring them before me or some other judicial officer of Spalding county, that what appertains to justice may be done in the premises, according to the statute in such cases made and provided. Herein fail not.

"Given under my hand and seal this November 21st, 1871.

(Signed) "WILLIAM M. CLINES,

"N. P., and *ex officio* J. P. [L. S.]

The cotton, at the time the deputy sheriff demanded it from the agent of defendant, was on the train at Griffin. White hesitated for some time and consulted several persons before he delivered the cotton to the sheriff. The cotton was placed in a warehouse and Wilkinson notified of the fact. Afterwards, a Mr. Freeman caused a factor's lien execution to be levied on said property. The lien execution was represented by John D. Stewart, Esq. Mr. Boynton, the attorney representing the plaintiff in the possessory warrant, notified his client of this action. Wilkinson replied to Mr. Stewart and Mr. Boynton that a settlement had been agreed upon between the plaintiff in the *fi. fa.* and himself, and requested that the cotton be sold. Stewart and Boynton never having heard of any one else claiming said property, directed the sheriff to sell the same, which was done, and the proceeds sent to Wilkin-

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son or Freeman. The sheriff took a sample of the cotton and went to the cotton-buyers, and sold it for the highest price offered. There never was any trial before a magistrate, and the defendant never appeared in person or by attorney in the matter. The cotton remained in the warehouse some two months before it was sold, no claim having been made to it except the factor's lien already mentioned.

The Court charged the jury as follows:

“GENTLEMEN OF THE JURY: This is an action in which the plaintiffs allege that they delivered to the defendant, a common carrier, two bales of cotton at Newnan, Georgia, to be transported by defendant for hire, from Newnan to Savannah, and there delivered to plaintiffs; that said two bales of cotton, of a certain alleged quality and of a certain alleged value, have not been transported by defendant to Savannah nor there delivered to plaintiffs, although demanded. It is incumbent on the plaintiffs to prove the delivery of said cotton to the agent of defendant at Newnan, for the purpose of transportation as aforesaid, the value of said two bales of cotton, and the failure of defendant to deliver said two bales of cotton to plaintiffs at Savannah, upon demand, after a reasonable time for the transportation and delivery of the same. If you believe from the evidence that the plaintiffs have proven these things, the plaintiffs are entitled to recover the proven value of said cotton at Savannah, less the freight for transporting the same, unless the defendant alleges and proves some valid defense excusing the defendant for the non-delivery of said cotton to said plaintiffs.

“The dilligence required of a common carrier is extraordinary, and the general rule is that nothing will excuse him for the non-performance of his contract except the act of God and the enemies of the State.

“The defendant alleges that it was prevented from complying with its contract by reason of said cotton having been taken out of the possession of the defendant by valid legal process.

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"I charge you that if you believe from the evidence that these allegations of defendant are true, the plaintiffs would not be entitled to recover.

"I charge you that the process must be a legal process by which said cotton was seized (if you believe from the evidence that the same was seized) to justify the defendant for the non-delivery of said cotton. .

"If you believe from the evidence that the process was a possessory warrant, in which there was embodied the name of no defendant, like the one in evidence here, I charge you such possessory warrant was not legal process.

"A possessory warrant sued out against some unknown party would not be legal process, and the seizure of said cotton by virtue of said warrant would not excuse the defendant for the non-delivery of said cotton to plaintiffs at Savannah.

"If you believe from the evidence, and in accordance with what I have already charged you, that the process was legal, yet if the agent of the defendant at Griffin delivered the cotton to the deputy sheriff, before he had actually seized it, the defendant would not be justified in the non-delivery of said cotton, and to have constituted a legal seizure of said cotton the officer must have put his hand upon it or been so situated that he could have put his hand upon it.

"I charge you that a legal seizure is the actual taking possession of or the ability and power of taking possession of the goods or chattels by the officer, and until this was done there was no seizure of said cotton.

"If you believe from the evidence that the agent of defendant at Griffin voluntarily took said cotton from the cars, and thereby knowingly enabled the deputy sheriff to seize said cotton, then such seizure (although the process might be legal) would not excuse the defendant, and your finding should be for the plaintiffs."

The jury returned a verdict for the plaintiffs for the sum of \$190 92. Whereupon, the defendant moved for a new trial, upon the following grounds:

1st. Because the Court erred in the charge to the jury in

reference to the validity of the possessory warrant under which the cotton was seized.

2d. Because the Court erred in the charge in reference to the liability of the defendant, even if the possessory warrant was legal.

3d. Because the Court erred in the charge in reference to the duty of defendant as towards an officer endeavoring to execute valid legal process.

4th. Because the verdict was contrary to evidence and to law.

The motion was overruled, and the defendant excepted upon each of the grounds aforesaid.

B. H. HILL & SONS; S. FREEMAN, for plaintiffs in error.

A. D. FREEMAN, for defendant.

McCAY, Judge.

1. It is true the text books, including our Code, do announce that a common carrier can set up no excuse for the *loss or destruction* of goods but the act of God or the enemies of the State. But this has been always qualified with certain limitations as to when his liability ceases, when he is discharged from further prosecution of his undertaking, as if the owner of the goods himself receives them short of the place of destination, or if they are not delivered by the fault of the owner; or that they have been taken from the carrier by title paramount, and lastly, that they have been taken from him by legal process. He has not lost the goods; they have not been stolen or been destroyed, but his undertaking as a carrier has been determined: Redfield on Carriers, sec. 24, note; see also same book, 245; 18 Vermont, 186; 11 Vermont, 323; 1 Duer, 79; 37 Barbour, 112. We admit that the process which terminates this employment must be a legal one: McClell. & Y., 136; 10 East., 530; 11 Z. B., 517. And that, we suspect, is the hinge on which this case turns.

2. Was this a *legal* process? Without question, the Court

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that issued it had jurisdiction : See Revised Code, 3956. Did it substantially comply with all the requirements of the Code? See section 3956. If there was a substantial compliance, the warrant, though irregular, was not void : See Revised Code, section 4, paragraph 6. The warrant issues on affidavit that the plaintiff had possession ; that he had been unlawfully deprived of it by the defendant, or that the property disappeared without his consent, and is now in possession of defendant. This affidavit, in substance, sets forth these very things. It says that affiant was in the legal, etc. ; that the property was taken out of his possession, without lawful authority, by some unknown person, and that said person put it on *the cars of the Griffin & North Alabama Railroad Company* where it now is, in the county of Spalding. What is wanting? It is said in the affidavit that the property was unlawfully taken, and that the unlawful taker put it on the cars of the railroad company. But it is said there is no defendant. Why not? The railroad company is charged to have the cotton ; it is charged to be now on its cars. We doubt if, in any possessory warrant, there is a more distinct pointing out of a defendant than this. The person in possession is the defendant. The magistrate seems to have treated the unknown person as the defendant, as he fails to order any arrest of the true defendant, and does order the arrest of one who is not the defendant. But this is a mere irregularity. It does not make the warrant void. The command to arrest the unknown taker of the property, who has not the actual possession, is mere surplusage. Nor is the failure of the warrant to direct the arrest of the railroad company such a want as to make the *warrant void*. The company, as such, could not be arrested ; and the want of authority to make an arrest is only a wrong to the suer out of the warrant. Could the company, if it had appeared, object to the warrant for this reason? We doubt if the Court issuing the warrant would have dismissed it for that reason, especially if the property had been before the Court, since the whole object of the arrest is to force the delivery of the property. We think, therefore, this was not a void warrant. The magistrate had

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jurisdiction; the affidavit pointed out a defendant, and substantially charged that the property was in possession of that defendant, (the company,) without lawful warrant or authority; the other defect was a mere irregularity, since, by the production of the property, the *arrest* (notice being given,) was made immaterial.

3. We think the Court erred in the other charge. If the warrant was legal, it was not in bad faith to the consignor for the agent to furnish all proper facilities to the sheriff to perform his legal duty. The evidence shows nothing but a proper performance of that duty which every man owes, as a good citizen, to the majesty of the law. We should hesitate long before we would say there is any relation in life that would make it the *duty of one* to keep his doors locked to shut out the sheriff who comes to execute a legal process. He may do so, it is true, in a certain class of cases, and the law may thus be baffled, but we know of no case where it is a man's duty to baffle the law.

4. The notice that is proven to have been given to both the consignor and consignee, and the total failure of both to furnish to the company any evidence to enable it to resist the sworn statement of the complainant in the warrant, we think justifies the company in not looking further after the cotton. It was but a fair presumption that, as neither of them seemed to care to go any further about contesting the claim, that it was a just one.

Judgment reversed.

NEIL MCCALLUM & BROTHER, plaintiffs in error, vs. HERMAN BRANDT, defendant in error.

At the same term at which judgment was obtained against the principal debtor, a defaulting garnishee moved the Court, after the discharge of the jurors, to be allowed to file his answer denying any indebtedness, and for cause why the answer was not filed before, showed that the original defendant had been, before that time, in a case of involuntary

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proceedings in bankruptcy, adjudged a bankrupt; that a new trial had been granted, and the proceedings in bankruptcy were still pending: *Held*, That the Court did not abuse his discretion in permitting the answer to be then filed.

Garnishment. Bankrupt. Before Judge GOULD. City Court of Augusta. May Term, 1872.

At the May term, 1872, of the City Court of Augusta, Neil McCallum & Brother obtained a judgment against Adolph Brandt, on an action of complaint, for \$620 13, besides interest and costs. Herman Brandt was served with process of garnishment in said suit, returnable to the February term, 1872, but had failed to file an answer. After the jury was discharged for the term, plaintiffs moved for a judgment against the garnishee. The latter then offered to file his answer denying any indebtedness to the defendant, and, as an excuse for his delay, stated that, at the instance of Russell & Alger, petitioning creditors, a rule to show cause why he should not be adjudged a bankrupt was granted by the Judge of the District Court of the United States for the Southern District of Georgia, and served on Adolph Brandt on January 26th, 1872, the alleged grounds of bankruptcy being the giving of a mortgage dated July 17th, 1871, to Julius Kaufman, which was foreclosed on January 13th, 1872, and a failure to meet his commercial paper. Cause was shown by Adolph Brandt to the contrary, but he was adjudged a bankrupt on April 1st, 1872. Subsequently, on the same day, such adjudication was set aside and a new trial ordered, which is still pending undetermined.

These facts were not disputed. The Court refused to allow judgment against the garnishee, and ordered his answer to be filed. To which ruling plaintiffs excepted.

FRANK H. MILLER, for plaintiffs in error.

JOSEPH P. CARR, for defendant.

TRIPPE, Judge.

We do not think the Judge abused his discretion in permitting the garnishee to file his answer at the time he did. The main defendant had been adjudged a bankrupt. It is true the judgment had been set aside, but proceedings were still pending in bankruptcy, and this was the reason the garnishee gave why he had not filed his answer before the jury was discharged, not believing that judgment could be taken against the principal debtor. The Court below seemed to think the fact that the pendency of the involuntary proceedings in bankruptcy suspended the jurisdiction of the State Court. There is some authority which goes to that extent, and this Court is not prepared unanimously to hold to the contrary. For myself, I do not think that such proceedings, before an adjudication of bankruptcy, affects a suit pending in the State Court, and that the weight of authority and principle are on that side. But with the difference of opinion that exists, and a party, under the advice of counsel, fails to file his answer in time, not believing that the Court would proceed further in the main suit, shall he be adjudged in contempt, (for it is as a *quasi* contempt,) and be adjudged to pay the whole debt? Though the last day of grace in such cases may seem to have passed, it is not always that the door is finally closed. In *Curhart & Ross vs. Ross & Company*, 15 Georgia, 186, when the day fixed in the rule taken under the law, as it then stood against a defaulting garnishee, had expired, he was still allowed to file his answer, on showing that the delay was occasioned by loss of papers, or, rather, by their being misplaced.

Judgment affirmed.

Hooper, Hough & Force vs. Dwinell.

HOOPER, HOUGH & FORCE, plaintiffs in error, vs. M. DWINNELL, defendant in error.

1. Where, in the fall of 1868, the plaintiff, by parol contract, rented to the defendants a store-house for three years, from March 1st, 1869, and defendants took possession accordingly, but one month prior to March 1st, 1871, notified the plaintiff that they would vacate the premises on that day, and the plaintiff took possession on September 1st, 1871, and sued out two distress warrants for the two quarters rent, from March 1st, 1871, to September 1st, 1871, to which the defendants filed the usual counter-affidavits:

Held, That if the statute of frauds is applicable to the case, and if the plaintiff is entitled to a specific performance of the parol contract, it was error in the Court to have so charged the jury, when the plaintiff had not alleged in his pleadings any equitable grounds which would have entitled him to that relief. (R.)

2. The plaintiff having taken possession of the premises rented on September 1st, 1871, before the three years, under the terms of the contract, had expired, he was not entitled to a specific performance of a part of the contract. (R.)

Landlord and tenant. Equitable remedy at law. Specific performance. Before Judge HARVEY. Floyd Superior Court. January Adjourned Term, 1872.

For the facts of this case, see the decision.

ALEXANDER & WRIGHT, for plaintiffs in error.

UNDERWOOD & ROWELL; WRIGHT & FEATHERSTON, for defendant.

WARNER, Chief Justice.

The plaintiff sued out two distress warrants for two quarters rent, claimed to be due him by the defendants for a store-house in the city of Rome. The defendants filed their counter-affidavit, denying that there was any rent due, as claimed by the plaintiff. On the trial of the issue in the Superior Court, the jury found a verdict for the plaintiff. A motion was made for a new trial, which was overruled, and the defendants excepted. It appears from the evidence in the record, that in

the fall of 1868, the plaintiff made a verbal contract with the defendants to rent them his store-house, then in process of construction, for three years from the time of its completion, for \$1,000 00 per annum, to be paid quarterly, or at the end of every three months from the time they took possession, which was about the 1st of March, 1869. The contract was to have been reduced to writing, but as the parties could not agree as to the exact terms of it, in relation to fire, etc., it was not done. The contract remained in parol, and the rent was paid promptly at the end of each quarter, up to the 1st of March, 1871. Plaintiff offered defendants \$200 00 to surrender the possession of the store-house, which they refused to do. Plaintiff told them he should expect them to keep it until the expiration of the full term for which they had rented it. They replied, "We expect to keep it." One month prior to the 1st of March, 1871, the defendants notified plaintiff that they would vacate the premises on that day, and did so. Plaintiff took possession of the premises 1st of September thereafter, and the rent claimed to be due is from the 1st of March until the 1st of September, 1871. The defendants, in their testimony, substantially admitted the parol contract for the rent of the store-house, as stated by the plaintiff. The Court charged the jury, amongst other things, that they could decree a specific execution of the parol contract, if the defendants admitted it, as a Court of equity would do.

This was a contract made between the parties, by the terms of which the relation of landlord and tenants existed, under the provisions of the Code, and is sought to be enforced by the summary remedy provided for therein. According to my individual judgment, the statute of frauds, or the specific execution of the contract, had nothing to do with the case on trial between the parties. The rights and remedy of the parties must be controlled by the provisions of the Code which regulates the relation of landlord and tenant. Where the owner of lands grants to another simply the right to possess and enjoy the use of such lands, either for a fixed time, or at the will of the grantor, and the tenant accepts the grant,

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the relation of landlord and tenant exists between them. In such case, no estate passes out of the landlord, and the tenant has only a usufruct, which he cannot convey, except by the landlord's consent, and which is not subject to levy and sale: Code, 2253. Contracts creating the relation of landlord and tenant for any time not exceeding one year, may be by parol, and if made for a greater time, shall have the effect of a tenacy at will: Code, 2554. The plaintiff, by his parol contract, simply granted to the defendants the right to possess and enjoy the use of the store-house for three years, and the contract being by parol, made the defendants, by the expressed terms of the law, his tenants at will; and being tenants at will, either party had the right to terminate it at will, on giving the legal notice—the landlord, by giving two month's notice to the tenants, and the tenants, by giving one month's notice to the landlord, which was done in this case.

This contract, under our law, was not a lease, as contemplated by the English statute of frauds, besides, the word lease is not in our statute of frauds. The words of our statute are: "Any contract for *sale* of lands, or any interest in or concerning them." There was no contract for the *sale* of the store-house, or for the *sale* of any interest in or concerning it, by the plaintiff to the defendants, but the contract was that the defendants should simply have the right to possess and enjoy the use of the same for three years, at the stipulated price for the rent thereof. The defendants had only the usufruct of the store-house as the plaintiff's tenants, which they could not convey to another, except by the plaintiff's consent. This contract was not a lease of the store-house, as defined by our law. A lease is where one grants to another an *estate* for years out of his own estate, reversion to himself: Code, 2252. Under this contract, no *estate* in or to the store-house passed out of the plaintiff to the defendants. There was no contract for the sale of the store-house, or for the sale of any interest in or concerning it by the plaintiff to the defendants, nor was there any estate for years in the store-house granted by the plaintiff to the defendants, so as to constitute a lease thereof, to which

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the statute of frauds could have had any application, and a specific performance of the parol contract have been decreed as charged by the Court. The defendants were simply tenants at will of the plaintiff, under the parol contract, and had the clear legal right to terminate their tenancy on giving the one month's notice, and thus avoid the payment of any further rent for the store-house.

What I have heretofore expressed is my individual opinion, and not the judgment of the Court. But we all concur in the opinion that, if the statute of frauds is applicable to the case, and if the plaintiff is entitled to a specific performance of the parol contract, it was error for the Court to have so charged the jury, when the plaintiff had not alleged in his pleadings any equitable grounds which would have entitled him to that relief. Besides, it appears from the evidence in the record that the plaintiff took possession of the store-house on the 1st of September, 1871, before the three years, under the terms of the contract, had expired, so that, in any view of the case, he was not entitled to a specific performance of a part of the contract, but was only entitled, if at all, to have the entire contract specifically performed in accordance with its terms; and upon these two grounds, we reverse the judgment of the Court below.

Let the judgment of the Court below be reversed.

THE CITY LOAN AND BUILDING ASSOCIATION OF AUGUSTA
et al., plaintiffs in error, vs. WILLIAM H. GOODRICH *et al.*,
defendants in error.

The stockholders of a chartered loan and building association agreed unanimously, at a period long antecedent to the time when, by the rules of the company, it would close, to cease operations and settle their mutual relations on principles of equity. At the same meeting a majority of the stockholders adopted by vote a scheme of settlement, which repudiated, as a basis, the rule of crediting each stockholder with his payments and legal interest thereon, and charging him with

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his receipts and legal interest, but was based upon an arbitrary compromise of the assumed rights of the borrowers and non-borrowers, under the charter, in its ordinary working. A large minority of the stockholders protested against this scheme and filed a bill in equity, seeking to enjoin the officers of the corporation from carrying out said scheme, and praying that the rights of the parties should be ascertained and the assets disposed of by the Court on principles of equity which the bill claimed simply required each stockholder to be credited with his payments and legal interest and charged with his receipts and legal interest:

- Held*, 1. Even though the rules of the company under the charter were not obnoxious to the laws against usury, still as by common consent it was agreed that the company was now to wind up, and as the contracts of the parties must therefore of necessity be set aside, and the rules of the charter be disregarded, it was not competent for the majority to adopt a scheme repudiating the rate of interest prescribed by law between persons having moneyed dealings with each other, and that the injunction was therefore properly granted.
2. The cardinal rule for the settlement among the stockholders on principles of equity will be to charge each stockholder with his receipts and interest on them from the time of the receipt, and to credit such stockholder with his payments and interest from the date of the same, according to the rules of law for such calculations, to divide the assets according to the result, subject, of course, to such equitable modification and adjustment as to expenses, losses, etc., as may appear equitable from the proof at the trial.
3. The injunction prohibiting the officers from carrying out the plan adopted by the majority ought not to hinder the collection of the debts due by the forfeiting stockholders.
4. Under the prayer of the bill it is the duty of the Chancellor to take such order as will ensure the speedy payment of the balances due and the collection of the assets, including any insurance policies, that the company may own or may hold as collaterals, according to the rights of the parties in each case, as well as balances due by stockholders as debts due by persons who had forfeited their stock before the date of the assessment, as will insure the speedy preparation of the whole matter for a final decree.

Injunction. Building and Loan Association. Equity. Usury. Before WILLIAM H. HULL, Esq., Judge *pro hac vice*. Richmond county. At Chambers. August 10th, 1872.

William H. Goodrich filed his bill against the City Loan and Building Association of Augusta, making substantially the following case: The defendant was organized under its

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constitution as a building and loan association in June, 1866, an order of incorporation having been obtained at the preceding April term of Richmond Superior Court. The constitution and by-laws being similar to those of other such institutions and being lengthy, are omitted from the bill. (See *Parker vs. Fulton Loan and Building Association*, 46 *Georgia Reports*, 166.) Clarence V. Walker took twenty-five shares of stock in said association, and subsequently desiring to effect a loan from the defendant of \$1,500 00, he borrowed, what was rated under the rules of defendant at \$5,000 00, gave his note for the last amount, and a mortgage to secure the payment thereof on the "Wiley Barron place," at the same time transferring a policy of insurance for \$1,000 00 on the house, and hypothecating his said stock. After a few months said Walker was unable to pay his installments on his stock, and transferred the same to complainant, with all the rights and privileges attaching thereto. Complainant has duly paid said installments up to the time it was agreed to wind up said association.

At a meeting of the stockholders of said association, on November 20th, 1871, a committee of ten was appointed, composed equally of borrowers and non-borrowers, for the purpose of "making an equitable and just settlement with each stockholder, with a view to closing the association." At a meeting held on the 11th of the succeeding month, said committee, by their report, suggested that every stockholder should be credited with the amount paid in, with interest thereon, and that every borrower should be charged with the amount received by him, with interest thereon, and that each stockholder should be charged *pro rata* with the annual expenses and losses. The report further suggested that any assets collected after the proposed settlement should be divided *pro rata* between the borrowers and non-borrowers, and that borrowers in arrears at the time should be allowed six months within which to pay up, with interest added.

This report was, on motion, tabled.

One of the committee then submitted a minority report, in

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substance, as follows: That the association should be closed on the basis that each non-borrower should be entitled to \$71 00 per share who had paid the sixty-sixth installment, and that in order to effect this end, the borrowers should be assessed \$21 00 per share, indulgence being extended to January 1st, 1872, to those unable to meet this demand. This report further suggested, that assets collected after such settlement should be divided among the non-borrowers, and that the president and board of directors should constitute an executive committee to close up the affairs of said association upon the above basis.

The minority report was adopted, complainant and many other members entering their protest against such action.

The house insured by Walker was consumed by fire in April, 1872, and the defendant insists that the amount of the policy should be paid to its treasurer, to be distributed according to the inequitable plan above set forth. Especially is such a course contrary to equity, as there has been paid to said defendant by said Walker, and by complainant as his successor, not only the principal of said \$1,500 00, originally borrowed, with the legal interest thereon, but an additional sum of \$1,018 70. Such a course cannot be pursued by the defendant for the further reason that by its action in the adoption of the aforesaid minority report, it has abandoned its constitution and has remitted each member to his respective rights in the joint enterprise or copartnership.

Prayer, that a receiver be appointed to take charge of the assets of said defendant, to be held until relief may be afforded to the parties at interest by a decree of this Court; that the defendant may be restrained by the writ of injunction from settling with its members upon the basis adopted in said report, and from collecting the money due upon the aforesaid policy of insurance until the further order of the Court; that the Southern Mutual Insurance Company be enjoined from paying said fund to the defendant; and that the writ of subpoena may issue.

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The answer is unnecessary to an understanding of the decision.

Judge Gibson refused to preside in the case because of relationship by affinity to the complainant. William H. Hull, Esq., an attorney at law, was selected by the parties as Judge *pro hac vice*.

The Chancellor passed the following order: "On hearing the above bill, it is ordered that the writ of injunction do issue restraining the said City Loan and Building Association from paying out any of the funds of the corporation to any stockholder thereof, unless in payment of a debt not growing out of his relation as stockholder, until the further order of this Court, and that said association be restrained by the same writ until the further order of this Court from collecting any note given by any stockholder for advances on his stock, except to the amount of the sum or sums advanced and interest thereon, at the rate of seven per cent. per annum, after crediting the same with all payments made since the giving of the note, according to the laws of the State on that subject.

"And that the said Southern Mutual Insurance Company be restrained until the further order of this Court from paying to any party the amount of money due on insurance, as mentioned in the bill.

"And it is further ordered, that before said writ of injunction shall issue, the complainants, or some of them, shall give bond, with good security, in the usual form of injunction bonds, in the sum of \$10,000 00.

"And it is further ordered, that complainants may hereafter, if they see fit, renew their application for the appointment of a receiver."

To wit: order the defendants excepted.

The record and bill of exceptions do not show by name any other parties in the above case than those stated in the report. But it is to be gathered from the pleadings that all the members of the association opposed to the plan of settlement adopted by the majority, were made parties complainant, and that the Southern Mutual Insurance Company was made

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a party defendant, though the writ of subpoena was not prayed against it.

JOSEPH P. CARR, for plaintiffs in error.

HOOK & GARDNER, for defendants.

MCCAY, Judge.

1. We see no reason to change the opinion we expressed at the last term in the case of *Parker vs. The Fulton County Loan and Building Association*, and only now add that it is pushing the usury laws very far to attempt by them to limit the right of parties going into a partnership or corporation to contract on what terms the partners shall use the common funds.

2. But however clear it may be that these contracts as made, are not usurious, it does not at all follow that this injunction was not properly granted. As charged by the bill and admitted by the answer, it was and is the agreement of all these parties that the corporation shall cease operations and its affairs be settled on principles of equity and right. Obviously, by this agreement, the *contracts* of the several parties are by common consent to be abandoned, since by the agreement it is impossible they shall be performed. Each of these contracts, not only those of the borrowers, but also of the non-borrowers, has as one of its fundamental essential elements, that it shall only be performed by monthly payments, which are to extend over the entire period of the existence of the corporation, and until, under its regular working, it will wind up. If it is to close now, at an arbitrary period, by agreement, these contracts are necessarily to be abandoned, and the parties are to stand without any *agreed* rule to adjust their relations to each other. Each has paid money into the common stock, and some have drawn out, and there have been expenses and losses. The end they all sought, has by agreement been abandoned by unanimous consent. It remains that their several relations to each other and to the fund is one not fixed by any agreement and must be regulated by the law

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of *ex equo ex bono*. What that is in questions of money is regulated by law. The parties who have paid in money and drawn none out, who have got nothing but burdens, ought, it seems to us, to get back their money with legal interest, and the parties who have used the money ought to account for it and legal interest. In such matters equity follows the law, which fixes a standard by which to determine what money is worth. Nor is there anything in the charter or in the new agreement which authorizes the *majority* to decide how the assets are to be divided. The agreement in terms abandons the charter, and with it the right of a majority to make rules also falls, and the parties are left to the relations which equity establishes.

3. We can easily see how the rule we have indicated for ascertaining the present status of each stockholder, by crediting him with his payments and charging him with his receipts, with legal interest, may need some qualification when the assets come to be divided. It is hardly equity that the non-borrowers, who have done nothing but pay, should bear also the burden of the past expenses. They ought, it seems to us, to get their money back, with legal interest, in full. But there ought to be some profits, and we leave all such adjustments for discussion and settlement according to the facts as they may be made apparent at the trial, after the assets have come in.

4. If the injunction was intended to restrain the collection of the debts due by those of the original stockholders, who, by forfeiture, had, at the date of the agreement, ceased to be members of the company, we think this was error, though we doubt if the Judge so intended. Such stockholders were not parties in any sense to the agreement or to the bill, and have no part or lot in the matter. What they owe is entirely independent of the agreement.

Whether the company or Mr. Goodrich is entitled to the insurance money, we are unable to say from the facts, as it does not appear from the record how he stands to the company under the rule we have suggested. The insurance money, as it seems to us, the company has a right to retain as security

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for whatever Mr. Goodrich may have to pay in making up the fund to be divided.

It is in the power of the Chancellor, and we take it for granted he will wisely exercise it, to take such order by interlocutory decree as will prepare the fund and marshal the assets for final division by the decree. He may do this by the appointment of an auditor, or master, or by the appointment of a receiver, or, if he sees fit, we see no objection to directing from time to time the proper officers of the company as agents of the Court to collect up the assets.

This *agreement* to suspend operations and close up the affairs of the company, is not, in any fair sense, either a present forfeiting or laying down the franchises of the corporation. Indeed, it would seem to be of great importance to the success of the agreement that the existence of the company do not terminate. By unanimous agreement, the members of any corporation may alter any stipulation which only affects their relations to each other—which does not take up or lay down any new privilege, or affect the rights of third persons, and we do not see that the agreement in this case does not fairly come within this principle. The parties do not desire a forfeiture, and it would be strange if the law will not permit them to divide their assets as they please. We are, therefore, of opinion that the relief sought for can be had by bill, and that jurisdiction is not exclusive by *scire facias*, in the Court of law, to forfeit the charter.

Judgment affirmed.

MARY A. E. R. HILL *et al.*, plaintiffs in error, vs. DANIEL S. PRINTUP, defendant in error.

A Judge of the Superior Court in this State did not have the power, either in term or at Chambers, under the Act of 20th February, 1854, or under the provisions of any statute, or of the common law, to grant authority to a trustee to sell and convey land held by said trustee for an infant *cestui que trust*, unless such infant was made a party to the

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proceedings instituted for that purpose by a representative properly appointed.

Trusts. Sale. Parties. Infants. Before Judge HARVEY.
Floyd Superior Court. July Term, 1872.

. Mary A. E. R. Hill and her husband, H. B. Hill, filed their bill against Daniel S. Printup to set aside a sale of property, held in trust for the said Mary, made by her father, James B. Perkins, to Daniel S. Printup, on August 25th, 1865. The bill alleged that the sale was made under an order of the Superior Court of Floyd county, obtained by Perkins, as trustee, at the January term, 1861, upon a petition filed by him for that purpose; that when the deed was made by said trustee under the aforesaid proceedings, the said *cestui que trust* entered her full and free consent on the same, and that the Superior Court, at the January term, 1866, passed an order affirming the sale. The bill further alleged that at the time of the granting of each of the aforesaid orders, and of the consent to the said deed, the said Mary was a minor; that she was not made a party, in any manner, to the proceedings had before said Court; that Printup purchased with full notice of all the facts aforesaid; that the proceeds of the said property was squandered by said trustee, and not applied to the use and benefit of the said *cestui que trust*.

Upon demurrer filed the bill was dismissed and complainants excepted.

WRIGHT & FEATHERSTON, for plaintiffs in error.

PRINTUP & FOUCHE; UNDERWOOD & ROWELL, for defendant.

TRIPPE, Judge.

Before the passage of the Act of February 20th, 1854, a Judge at Chambers had no power to order the sale of trust property: 10 *Georgia*, 429. By that Act he might so order "where all parties in interest are represented and consenting,

and where there is no question of fact in dispute, * * * and such orders and decrees shall be as valid as if passed and made during the regular session of the Superior Court of the county on the verdict of a jury." This Act implies that if such order be obtained in term time, it must be on the verdict of a jury. If it be granted at a regular term, then it is from a Court of chancery, and chancery jurisdiction is conferred in this State upon the Superior Courts, and not upon the Judges thereof: 10 *Georgia*, 429; Cobb's Digest, 467.

This was the state of the law before the Code, and a verdict of a jury was necessary when the order or decree was granted at a regular term. By section 4147, a verdict may not now in all cases be required. But whether the application be made at Chambers or at a regular term, all parties in interest must have notice and be represented or made parties to the proceedings. If a minor be interested, and have a guardian, that guardian must be a party, and if he have no guardian there must be a guardian *ad litem* appointed. These are the present statutory provisions, as will be seen by sections 4164, 4165 of the Code, and they are but affirmations of what the law was before.

In the argument, authority was quoted from 1 Daniel Chancery Practice, 205, that "an infant defendant is as much bound by a decree in equity as a person of full age," etc. The very quotation shows that the infant in such cases is a *defendant* and a *party*, and the same authority says it is the rule to serve the minor personally with the process.

In all Courts, English or American, all parties in interest, whether *sui juris*, married women, infants or lunatics, must be made parties to proceedings affecting their interests, and must have notice: 30 *Georgia*, 394; 2 Mad. Pr., 351. As a general rule, a trustee cannot institute proceedings in a Court of equity, relating to the trust property, without making the whole of the *cestuis que trust* parties: Hill on Trustees, 543; 1 Dan. Ch. Pr., 311. The cases where it is not necessary to make them parties are such as trustees acting under a deed, with power to sell and to apply the proceeds, or where the in-

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terest of the *cestui que trust* is collateral to the rights of the plaintiff trustee and the defendant to the suit; as where a bill is filed by one trustee against his co-trustee, to compel him to replace the trust fund, which had been misapplied or appropriated by him: Hill on Trustees, 543, 545; 3 Ves., 75; 1 Dan. Ch. Pr., 312. If it be a suit at law for asserting or defending the legal title, and the legal interest be in the trustee, he may, alone, be a party.

In the case under consideration, the father was the trustee of his infant daughter. In an *ex parte* proceeding, he obtained an order to convert land into money. He was not under bond as trustee, and no bond was required to secure to the infant the proceeds of the sale. The infant did not have a guardian, whose duty it would have been to have protected her rights, and who would have been liable for his failure so to do.

We do not think an order was legal or valid giving authority to the trustee to make such a change as this in the property of a minor *cestui que trust* without the guards the law provides for her protection being observed. The order obtained after the sale from the Judge, ratifying what had been done, was procured upon the written consent of the *cestui que trust*, who was still a minor, being quite a young girl, and incompetent to give her consent so as to be bound by it. The bill charged knowledge of all these facts on the part of defendant.

We are of opinion that the Court erred in sustaining the demurrer and dismissing the bill.

Judgment reversed.

RICHARD V. MITCHELL, plaintiff in error, vs. DANIEL S. PRINTUP, defendant in error.

Where land is leased for a term of years, and the lessee places improvements thereon, and, before the expiration of the lease, sells said im-

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provements and his interest under the lease to the lessor, taking a note in part payment therefor, the lessee is not entitled to a vendor's lien upon the land for the amount of the note. (R.)

Vendor's lien. Before Judge HARVEY. Floyd Superior Court. January Adjourned Term, 1872.

Daniel S. Printup brought complaint against Charles H. Smith, as administrator of William R. Smith, deceased, on a note for \$225 00, claiming as security therefor a vendor's lien on the land of Richard V. Mitchell. The jury returned a verdict for the plaintiff for the amount of said note with interest, and established said lien.

The property upon which the lien is claimed was conveyed by William R. Smith to James P. Perkins, and by Perkins to R. V. Mitchell, before the commencement of this suit. Perkins and Mitchell purchased with notice of Printup's claim.

For the remaining facts, see the decision.

WRIGHT & FEATHERSTON, for plaintiff in error.

PRINTUP & FOUCHE; UNDERWOOD & ROWELL, for defendant.

WARNER, Chief Justice.

The plaintiff brought his action against the defendant on a promissory note made by his intestate, and claimed that he was entitled to a vendor's lien on the land of the intestate to secure the payment of the note on the following statement of facts. On the 4th day of October, 1850, the defendant's intestate executed to the plaintiff a lease for a city lot in the city of Rome, for the term of fifteen years, the plaintiff to pay yearly the sum of \$25 00 for the rent of the ground. At the end of the term, the defendant's intestate, William R. Smith, was to have all the improvements which the plaintiff might put on the lot at a reasonable valuation, or the plaintiff was to have the refusal to buy the lot at a reasonable valuation.

The plaintiff built a brick law office on the lot and occupied the same. It is claimed by the plaintiff that in the month of October, 1857, the date of the note, that he sold to the defendant's intestate his interest in the house built by him on the lot, and that the note now sued on was given in part payment of the purchase money due therefor.

There is no evidence in the record of any such sale, or that the note was given in part payment thereof. But conceding these facts to have been proved, would the land of the intestate, on which the house was built in accordance with the agreement of the parties in the lease, be bound, under the vendor's lien, for the value of the house for which it is alleged the note was given? In our judgment, the plaintiff cannot enforce a vendor's lien for the payment of the note against the land of the intestate, on the statement of facts disclosed in this record. The plaintiff never had any title to the land, but, on the contrary, recognized the title thereof to have been in the intestate by stipulating in the lease that he would pay \$25 00 yearly for the rent of the ground on which the house was to be built. The agreement was that the plaintiff might build his house on the intestate's land, occupy it until the expiration of the lease, by paying the yearly ground rent of \$25 00, and then, instead of removing the house, he was to be paid a reasonable valuation for it, or the plaintiff should have the refusal to purchase the lot at a reasonable valuation. The plaintiff did not wait until the termination of the lease, but, as it is alleged, sold his interest in the house and his rights under the lease to the intestate, and took the note in question in part payment thereof. Did the plaintiff sell or convey any land to the defendant's intestate which would entitle him to a vendor's lien thereon for the unpaid purchase money due therefor? The title to the land was already in the defendant's intestate. The plaintiff sold the value of the improvements he had put on the land and his rights under the lease. In other words, he relinquished to the owner of the land all his rights under the lease, including the improvements made thereon, at a reasonable valuation, it is to be pre-

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sumed, or he would not have done so. The sale of his rights, including the improvements on the lot under the agreement contained in the lease, to the defendant's intestate in October, 1857, was not such a sale or conveyance of land as will give to the plaintiff a vendor's lien on the land of the defendant's intestate for the unpaid purchase money due therefor.

Let the judgment of the Court below be reversed.

JOHN JONES, plaintiff in error, vs. THE STATE OF GEORGIA,
defendant in error.

1. This Court will not reverse the judgment of the Judge of the Superior Court refusing a new trial, simply because, from the evidence, there may arise in a fair mind a reasonable doubt of the prisoner's guilt.
2. To authorize a new trial on this ground, the failure in the testimony to establish guilt must be so complete as to make doubt and uncertainty inevitable. If a fair mind may, under the testimony, be satisfied beyond a reasonable doubt, the verdict is not illegal.

Criminal law. New trial. Reasonable doubt. Before Judge HOPKINS. Fulton Superior Court. October Term, 1872.

John Jones was placed on trial on an indictment charging him and one Joe Bugg with the offense of robbery, alleged to have been committed upon A. Hartman on September 19th, 1872. The defendant pleaded not guilty.

The evidence made the following case: On September 18th, 1872, as Hartman was proceeding towards Decatur from Atlanta, near the line between Fulton and DeKalb counties, Joe Bugg, a colored man, approached and asked him if he knew where he could obtain employment as a blacksmith. Upon Hartman's stating that he did not, Bugg produced a small brass lock, which he said he carried as a specimen of his work, at the same time showing to Hartman how he locked and unlocked it with a spring. Whilst engaged in this conversation, another colored man came up, to whom Bugg propounded the

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same question as to employment. This individual replied that he knew a man on the Air Line Railroad who wished to hire a good blacksmith. The new comer had a heavy black beard all around his face, of the "kinky" order, but not as "kinky" as a negro's hair. The defendant strikingly resembles this person, with the exception that he has no beard. If the defendant is the same person, the beard was false. The new comer asked to see the brass lock. Taking hold of it, he endeavored to unlock it, but failing, he proposed to bet Bugg \$20 00 or \$50 00 that he could not unlock it. Bugg replied that he had no money, but said that Hartman would bet him that he (Hartman) could unlock it. Hartman, suspecting something wrong, started off, when the man with the beard asked him if he was not going to bet? Upon Hartman's replying that he was not, this person stated that he was going to have \$20 00 out of him. Bugg simultaneously drew and presented his pistol, saying to Hartman that if he left without handing over \$20 00 he would shoot him. Thus intimidated and alarmed for his life, Hartman handed \$20 00 to the bearded negro, who immediately went off into the bushes. When this individual was gone, Bugg retired also.

Mrs. A. C. Watts, who saw the person supposed to be the defendant as he was approaching Hartman, testified that the resemblance to the defendant in size, color and general appearance was striking. That he had no beard at the time he passed her. That she did not have an opportunity to scrutinize his face, as he held his head down in such a manner as to conceal it.

Hartman stated that he had no doubt but that the defendant was one of the men who robbed him; that the beard was false, and used as a disguise.

Joe Bugg, who had previously, during the same term, been convicted, testified that the man with the beard was one Lewis Sharp, who had, since the commission of the offense, absconded; that defendant was not with him.

Dorothea Webster testified, that Bugg, defendant, and Sharp were all in a wagon yard together on Decatur street, in the

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city of Atlanta, on the day of the alleged robbery. She further stated facts tending to prove an *alibi* for defendant.

The jury found the defendant guilty. A motion for a new trial was made, because the verdict was contrary to the law and the evidence. The motion was overruled, and the defendant excepted.

THRASHER & THRASHER, for plaintiff in error.

JOHN T. GLENN, Solicitor General, for the State.

McCAY, Judge.

This case turns solely on the question whether the verdict of guilty is so entirely unsupported by the testimony as to make the verdict illegal. It is assumed that if the evidence leaves the mind of *this Court* in doubt as to the guilt of the accused, that the verdict is illegal. We do not so understand the rule. If the jury doubt, it is their duty to acquit; but if they have found the defendant guilty, and the Judge has refused a new trial, the evidence must be so shockingly insufficient as to satisfy this Court that no reasonable mind could fail to doubt. The object with which we look into the testimony is to determine the state of the mind of the jury. We strive to discover, not so much the guilt or innocence of the prisoner, as whether the jury have made an honest verdict, and have not acted by mistake, passion or prejudice. To apply this rule to this case, we cannot say that a fair-minded jury might not, from this testimony, have been satisfied beyond a reasonable doubt, of the guilt of the accused. It is a very fair inference that the prisoner put a false beard on his chin after the lady got past him, and had it there when he came up to the person robbed. This supposition would clear up almost all doubt of his guilt, and this supposition is almost inevitable, because of the singular difference of these two witnesses as to the presence or absence of a beard on the same man, at almost the same time. For it is clear that the man the lady saw without a beard was the same man who, with a beard,

aided in the robbery. The evidence of the accomplice is worth very little. Indeed, when the defense failed to show that there was any such man about Atlanta at that time as he names, referring, as he does, to Rice, and others who knew him, the argument that Sharp is a myth is very strong. The statement of the colored woman as to Sharp has but little weight, since that the man she testifies was Sharp, depends on the prisoner's and his accomplice's statements, made to her, too, after the arrest. On the whole, while the proof of the identity of the prisoner with the robber is not proven as clearly as identity is sometimes proven, we can easily see how an honest jury might feel no reasonable doubt of that identity.

Judgment affirmed.

CHARLOTTE ROE, plaintiff in error, vs. JOHN C. MAUND, defendant in error.

1. When there are two deeds executed at different times by the same vendor to different vendees, and both are recorded, but neither of them within twelve months from its execution, the oldest deed has priority over the one subsequently executed.
2. Under the evidence in this case, the Court below should have granted a new trial.

New trial. Deed. Registry. Ejectment. Before Judge SESSIONS. Appling Superior Court. March Term, 1872.

John C. Maund brought complaint against Charlotte Roe, for lot of land number three hundred and twenty-five, in the second district of Appling county, containing four hundred and ninety acres. The defendant pleaded a prescriptive title.

The facts of this case were as follows: Both parties claimed under a grant to James Phillips, dated April 27th, 1839. Plaintiff held under a deed from Phillips to W. B. Gideon, dated November 5th, 1843, and the defendant under a deed from the grantee to Robert Flurnoy, dated in June, 1839. Neither of these deeds were recorded within twelve months.

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The Court charged the jury, "that the plaintiff could not recover on the weakness of the defendant's title, but on the strength of his own; that neither deed from the grantee being recorded in time, the oldest would prevail."

The jury returned a verdict for the plaintiff. The defendant moved for a new trial because the verdict was contrary to the evidence and the charge of the Court. The motion was overruled and defendant excepted.

W. B. GAULDEN, by brief, for plaintiff in error.

J. C. NICHOLS, by Z. D. HARRISON, for defendant in error.

TRIPPE, Judge.

1. The principle that the oldest deed has precedence over a subsequent deed, when neither is registered within twelve months of its execution, although the junior deed be recorded first, has been decided and recognized in 10 *Georgia*, 253; 13 *Ibid.*, 1; 25 *Ibid.*, 648; 29 *Ibid.*, 440; 33 *Ibid.*, 565; See Code, section 2663.

2. There was no evidence in the record to show that the title which was conveyed out of the grantee by the oldest deed should not prevail. The plaintiff could recover only on the strength of his own title, and if defendant showed a prior deed from the grantee to another vendee, it was evidence that there was a better title than plaintiff's vendor held.

Judgment reversed and new trial granted.

FLEMING JORDAN, Solicitor General, plaintiff in error, vs.
ELBERT W. BAYNES et al., defendants in error.

Pending the proceedings by *scire facias* against the securities on a bond given for the appearance of a prisoner who was charged with the offense of murder, an Act of the General Assembly was passed relieving the securities from liability on the payment of the costs. The

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Solicitor General had no vested right in the bond to the amount of five per cent. of which the General Assembly could not deprive him. (R.)

Criminal law. Constitutional law. Costs. Before Judge ROBINSON. Jasper Superior Court. August Term, 1872.

For the facts of this case, see the decision.

FLEMING JORDAN, Solicitor General, for plaintiff in error.

C. L. BARTLETT, for defendants.

WARNER, Chief Justice.

It appears from the record in this case that the bond of one Digby, who was indicted for murder, and his securities had been forfeited, that a *scire facias* was issued thereon against the securities and whilst the same was pending, and before judgment the General Assembly passed an Act relieving the securities from all liability on said bond on the payment of all costs. The defendants having pleaded the Act to the *scire facias* pending against them, the Court decided that the securities should be discharged from their liability on said bond upon their paying to the Solicitor General of the sum of \$5 00 for his costs, and the Court costs due on the *scire facias*. Whereupon the Solicitor General excepted. In our judgment the Solicitor General was entitled to the \$5 00 allowed him by law for the proceeding by *scire facias* to enforce the recognizance and no more, except such fees as are allowed him by law to be taxed as Court costs, and which the securities were bound to pay under the Act. The Solicitor General claims that he had a vested right in the bond to the amount of five per cent. of the sum due thereon, of which the General Assembly, by the passage of the Act in question, could not deprive him. This was a debt due to the State, and not a debt due to the Solicitor General, either in his official capacity or otherwise, and being a debt due to the State, it was competent for the General Assembly to relieve the securities from the payment of it on such terms as they might deem proper. There was

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no judgment on the *scire facias*, and if there had been, it is not perceived how that could have vested in the Solicitor General a right to receive five per cent. on the amount of the bond. The law gives to him, as his fees for every amount *collected* on proceedings to enforce a recognizance, five per cent. as an officer of the State, and that is all.

Let the judgment of the Court below be affirmed.

MACON AND AUGUSTA RAILROAD COMPANY, plaintiff in error, *vs.* CLAYTON VAUGHN, defendant in error.

When in a suit, against a railroad company, for killing the plaintiff's mule by the negligent running of its trains, it appeared that the mule was found dead near the track one morning, under circumstances indicating that it had been killed by the train, which had passed that way during the previous night, and it further appeared that the place where the mule was killed was in a field, into which the plaintiff had turned it with other stock to graze, and that said field was a common inclosure of the plaintiff's land and the railroad track—the plaintiff's fence on two sides, running over the right of way to the track, and with cattle-pits across the track :

Held, That under such circumstances the railroad company was not liable for killing the mule, unless there was some actual negligence of the persons managing the train, and it appearing affirmatively by the evidence, (without contradiction) that there was no negligence or want of care, and the jury having found for the plaintiff, the Judge ought to have granted a new trial.

Railroads. Negligence. Fences. Before Judge ROBINSON. Baldwin Superior Court. August Term, 1872.

Clayton Vaughn brought complaint against the Macon and Augusta Railroad Company for \$250 00 damages, alleged to have been sustained by reason of the killing of a mule by defendant.

The defendant pleaded the general issue, and that the killing of the mule was the result of an unavoidable accident.

The evidence made the following case: The mule was found on October 28th, 1871, near the track of defendant, in a

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mutilated condition, with every appearance of having been killed by a passing train. The right of way of the defendant was not inclosed. A fence inclosed plaintiff's farm together with the right of way, on both sides of defendant's track, but there was nothing to prevent stock from grazing on either side of said track at pleasure. It was plaintiff's habit to turn his stock into this inclosure after the crops were gathered. A high fence crossed the right of way of defendant to the track, with a cattle-pit across the latter, on each side of plaintiff's land. The ownership and value of the mule were proven as charged in the declaration. The defendant proved that every care and precaution was exercised by its employees on the night the mule was killed. This evidence was uncontradicted.

The jury returned a verdict in favor of the plaintiff for \$200 00. A motion was made by the defendant for a new trial on the grounds that the verdict was contrary to the evidence and to the law. The motion was overruled and the defendant excepted.

L. H. BRISCOE; GEORGE F. PIERCE, by Z. D. HARRISON,
for plaintiff in error.

CRAWFORD & WILLIAMSON, for the defendant.

MCCAY, Judge.

The evidence of the absence of any negligence in running the train at the moment of the killing of this mule is very strong, and is wholly uncontradicted. Nobody saw the mule killed; indeed, it is only by inference (very strong, it is true,) that the fact is made out of the killing by the train at all. It was night, and the driver testifies positively to the use of the greatest care. A railroad company is not liable for an *unavoidable* accident, even under our statute in relation to stock. If, with every reasonable precaution, proper lookout, and proper speed and proper attention, an unavoidable damage ensues, the company which has, by law, a right under such precautions to run its trains, is not responsible.

Macon and Augusta Railroad Company vs. Vaughn.

The presumption is against the road, and the proof under our law must be made that there was no negligence or want of ordinary care. It has been argued in this case that, as the road was not fenced, this was negligence; that nobody has a right to use a dangerous machine like a moving train, except within an inclosure. This is a very important question, and one that is not definitely settled in this State; at least, so far as to determine whether, if this be *all* the negligence shown in a particular case, a railroad company is liable for accidents to stock running at large. We do not, however, think the question arises here. This killing was of stock in a field into which the mule had been deliberately turned by the owner. The field was a common one. It inclosed the road as well as the plaintiff's land, and it was, in the nature of things, a *mutual* inclosure. By running his fence up to the road, and having pits dug across the track, the plaintiff consented that the defendant's inclosure and his should be a common one, and should be used by each for its own purposes. As to the plaintiff, therefore, there was no negligence in the company for failing to have a fence. Against everybody else it had a fence, and as to him, there was a mutual consent that there should be a common inclosure. He turned his mule into that field with a full knowledge of the danger and of the mutual arrangement. He knew the trains would pass, and pass at night, and that the very thing which did happen might occur. He had the right to expect that the agents of the company would exercise care and prudence in running the train. That, it is proven, they did. The question of the duty of the company to build a fence against stock running at large does not, therefore, in our opinion, arise.

Judgment reversed.

AMELIA SMITH, plaintiff in error, vs. JOHN L. HAMILTON et al., defendants in error.

1. A gave B an obligation to pay a certain amount of money, and also to assume and discharge the debts owed by B, and by B and A, as contained in a schedule therein referred to, and at the same time executed to B a mortgage to secure him for said certain sum, and also for the payment of said debts, reciting in the mortgage the fact that said obligation was given, and its substance :

Held, That the lien of said mortgage is good to indemnify B for whatever amount of said debts he may have to pay.

2. That the wife of A, who sets up a purchase of the mortgaged property from her husband after the execution of the mortgage, and with notice of it, cannot enjoin B from enforcing his rights under the mortgage, on the ground that said debts were not included in the mortgage, or that she had no notice of their amount.

Injunction. Mortgage. Before Judge HARVEY. Floyd Superior Court. January Term, 1872.

Amelia Smith filed her bill against John L. Hamilton and Levi P. May, sheriff of Floyd county, making, substantially, the following case: On May 27th, 1869, Hamilton and Smith, the husband of complainant, entered into a written contract, by which the former sold to the latter his entire interest in the stock of drugs, etc., in the store of Hamilton & Smith, and in the rights and credits belonging to the same. In consideration of which, Smith agreed to pay to Hamilton \$1,100, as follows: \$100 00 in cash; \$575 00 on or before January 1st next thereafter, and the balance of \$425 00 to be canceled by the conveyance by one Doyle of a lot in the city of Dalton to said Hamilton. Smith further assumed the payment of the entire debts and liabilities of the late firm of Hamilton & Turnley, of J. L. Hamilton, as their successor, and of the firm of Hamilton & Smith, as contained in a schedule that day agreed upon; and if the schedule should be subsequently found to be incorrect, a due and proper allowance should be made therefor in a final settlement.

On the same day, Smith executed to Hamilton the following mortgage:

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“GEORGIA—FLOYD COUNTY:

“Know all men by these presents, that whereas, I have this day purchased of Dr. J. L. Hamilton his entire interest in the stock of drugs and medicines and merchandise in store in the city of Rome, and have given my obligation to pay the balance of the purchase money, being \$575 00, by or between this and the first day of January next, according to the terms of a covenant this day made him, to secure said Hamilton in the faithful and just performance of my contract touching the said sum of \$575 00, and the payment of the liabilities of the late firm of Hamilton & Turnley, and of said Hamilton, and of the late firm of Hamilton & Smith, in the drug business: I do hereby mortgage to him, the said Hamilton and his assigns, the said interest which he has this day conveyed to me, with all the rights and privileges under said mortgage, as now appertain to like conveyances and securities by the laws of this State.

“In witness whereof I have hereunto set my hand and seal this 27th May, 1869.

(Signed)

“J. D. SMITH.

“In presence of:

“THOMAS J. PERRY, J. P.”

On November 15th, 1869, complainant purchased of her husband, J. D. Smith, with notice of the aforesaid mortgage, but not of the above recited contract of sale, the said stock of goods, upon the following terms: complainant was to account to said Smith and his family for \$1,000 00, said sum being the exemption of personalty allowed to them by the Ordinary of Clay county, in said stock; also, to pay the balance due on the mortgage to Hamilton. Complainant paid to Smith on the day of the sale to her, \$3,000 00 for said goods, and on January 4th, 1870, settled the balance due on the mortgage, to-wit: the \$575 00. Notwithstanding these facts, Hamilton has foreclosed said mortgage, alleging to be due thereon \$2,120 64 principal, and \$100 00 interest, and is about to have the execution based thereon, levied upon said stock of goods. If

complainant were to claim said stock after the levy, she would be unable from poverty to give the necessary bond and security. Hamilton is insolvent and therefore unable to respond to complainant for the damages that will be sustained by her in case a levy is made. Prayer, that Levi P. May, sheriff, and his deputies, be enjoined from levying said mortgage execution, and that if the same be already levied, that said levy be directed to be dismissed, unless the plaintiff in execution give bond and security in the sum of \$4,000 00, to secure complainant in any damage she may sustain; that the mortgage execution be canceled; that the writ of subpoena may issue.

The defendants demurred to the bill. The demurrer was sustained and the bill dismissed. Complainant excepted to the aforesaid ruling and assigns error thereon.

W. D. ELAM, by T. W. ALEXANDER, for plaintiff in error,

SMITH & BRANHAM, by UNDERWOOD & ROWELL, for defendant in error.

TRIPPE, Judge.

J. D. Smith purchased of Hamilton his interest in a stock of drugs owned by Hamilton & Smith, and gave his obligation to pay Hamilton a certain amount of money, and also to pay certain debts of Hamilton & Smith, and other debts for which Hamilton was liable. The obligation recited that a schedule of those debts was agreed upon and in Smith's possession. Smith at the same time executed to Hamilton a mortgage on the interest he purchased, "to secure Hamilton in the faithful and just performance of his contract, touching said sum of \$575 00, and the payment of the liabilities of Hamilton & Smith," etc., referring therein to the obligation above mentioned.

Mrs. Smith, the wife of J. D. Smith, claims that she afterwards purchased from her husband the whole stock of drugs; that she had notice of the mortgage, and paid the \$575 00, but denies that she had any notice of her husband's liability

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for the payment of the debts of Hamilton & Smith and others, and prays an injunction to restrain Hamilton from levying a *fi. fa.* sued out on the foreclosure of said mortgage, on the goods mortgaged. She alleges that she cannot file her claim if the levy is made, and give the bond and security required by law.

We think that the specification of the debts or liabilities for which the obligation was given was sufficient, and it was therein stated that they were set forth in a schedule in the possession of the obligor. That bound the obligor, and for a sum certain, or a sum which could, with absolute verity, be made certain. The mortgage was given to secure the performance of the terms of that obligation, stating what those terms were.

In 10 New Hampshire Reports, 210, it was held that where a mortgage is given to secure a particular sum, and also a bond, the condition of which covers all the liabilities of the mortgagor to the mortgagee, the mortgage shall be construed in conformity with the bond. In that case, the Court say, "the bond being made at the same time, and referred to in this manner, may be considered, as between the parties, as if it was part of the condition."

Here the obligation or bond and the mortgage were executed the same day; the mortgage referred to the obligation and its contents, and was given to secure its performance. The wife of the mortgagor, who sets up a subsequent purchase from her husband, admits notice of the mortgage, but denies that she knew it was for more than a security for \$575 00. If she had notice of the mortgage, it was notice of all its recitals, and of all the debts it was given to secure. It will not do in such a case to permit a husband, by a transfer to his wife, to enable her to set up technicalities whereby the property may be protected from the payment of his liabilities.

Judgment affirmed.

ALATIA C. WESTBROOK, trustee, plaintiff in error, vs. JOHN G. DAVIS et al., administrators, defendants in error.

1. Defendants in equity cannot, at the same time, charge and discharge themselves by their answer. (R.)
2. The Court should instruct the jury as to what was, and what was not responsive to the bill, in order to make it evidence for the defendants. (R.)
3. Where a trustee received a large sum of money in April, 1860, and in February, 1864, obtained an order from the Judge of the Superior Court, authorizing him, as trustee, to invest the fund then in his hands in Confederate money, in Confederate bonds, which was done, and the same became worthless, it was error to charge that the order of the Judge of the Superior Court was conclusive proof that it was trust money which was so ordered to be invested. (R.)
4. When a trustee has received Confederate money during the war in the discharge of his legal duty, when it was the common currency of the country, in good faith, when prudent business men were receiving it, he will be protected, but the facts and circumstances under which it was received, must be clearly and satisfactorily shown as evidence of that good faith and the fairness of the transaction. (R.)
5. If a trustee violates the law in the discharge of his duties, he is responsible for such violation, no matter how honestly he may have acted. (R.)

Equity. Charge of Court. Evidence. *Res adjudicata*. Trustee. Confederate money. Before Judge COLE. Houston Superior Court. May Term, 1872.

For the facts of this case, see the decision.

C. C. DUNCAN; SAMUEL HALL; NISBETS & JACKSON, for plaintiff in error.

B. M. DAVIS; WARREN & GRICE, for defendants.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendants as administrators of Burnham, praying for an account and settlement of a fund of \$4,081 68, alleged to have been received by their intestate in his lifetime, as trustee for Catharine Westbrook. On the trial of the case, the jury, under

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the charge of the Court, found a verdict for the defendants. A motion was made for a new trial on the several grounds set forth in the record, which was overruled by the Court and the complainant excepted. It appears from the record that on the 26th day of April, 1860, Burnham, the defendants' intestate, received as trustee for Mrs. Westbrook, the sum of \$4,081 68. In February, 1864, Burnham obtained an order from the Judge of the Superior Court authorizing him, as trustee, to invest the fund then in his hands in Confederate money in Confederate bonds—which was done, and the same became worthless.

The main point in the case is, how and in what manner did the fund received by the trustee in 1860, glide into Confederate money in 1864, when the same was invested by him in Confederate bonds under the order of the Judge of the Superior Court? It is quite clear that it was not Confederate money when the trustee received it, and he never made any return of his actings and doings as trustee, in relation to that trust fund, as the law required him to do. The defendants admit in their answer that their intestate received the \$4,081 68, as charged in complainant's bill, but allege that to the best of their information and belief that fund was converted into Confederate money by their intestate in the due execution of his trust, and ask to be protected under the order investing the same in Confederate bonds. The Court charged the jury that the answer of the defendant, upon their information and belief, was not evidence, unless responsive to the bill, then it is evidence, but did not instruct them what was or was not responsive to the bill. This charge of the Court, in view of the facts of the case, was error. As before stated, the answer admits the receipt of the money by their intestate in 1860, but sets up by way of *avoidance* of his liability therefor, that in some way in the execution of his trust it got into Confederate money. This latter part of the answer was not responsive to the allegations in the bill, and was not evidence for them, it being upon their information and belief only. The Court should have instructed the jury as to what

was and what was not responsive to the bill in order to make it evidence for the defendants: *Neal vs. Patton*, 40 *Georgia Reports*, 363. The Court also charged the jury contrary to the request of complainant's counsel, that the order of Judge Lochrane was *conclusive* proof upon complainant that it was trust money which was so ordered to be invested. This charge of the Court was error in view of the facts of this case. Whilst it may be true that the order of Judge Lochrane was conclusive that the defendants' intestate did invest the Confederate money then in his hands as trust property, still, that order was not conclusive as to how or in what manner the fund received by the defendants' intestate in 1860 got into Confederate money in 1864. The point in the case was how did the trust fund received by the defendants' intestate in 1860 get into a Confederate trust fund in 1864, to be invested as such under that order. The defendants' intestate, by some means had converted the trust fund into Confederate money, and the order only authorized him to invest *that Confederate money*. Whether the defendants' intestate had wrongfully or improvidently converted the trust fund received by him in 1860 into Confederate money, as such trustee was not involved or adjudicated by the order of Judge Lochrane.

It is true, this Court has held on several occasions, and now holds, that when trustees have received Confederate money during the war in discharge of their legal duty when it was the common currency of the country, in good faith, when prudent business men were receiving it, that they would be protected; but this Court has always held that the facts and circumstances under which it has been received, must be clearly and satisfactorily shown as evidence of that good faith and the fairness of the transaction, or they will not be protected. When a trustee, in the discharge of his legal duty, has received into his hands good funds, and seeks to discharge himself from liability therefor, on the ground that the same has been converted by him into Confederate money and lost, the burden of proof is upon the party who insists upon such loss, and he should be required to make clear and satisfactory proof that

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he has acted with entire good faith to entitle him to be protected. The definition of good faith which the Court gave in charge to the jury in this case was error, to-wit: "Honesty and a purpose to do right, no matter how mistaken about the law." If a trustee violates the law in the discharge of his duties as trustee, then he is responsible for such violation, no matter how honestly he may have acted; his ignorance of the law will not excuse him, for trustees as well as other persons are bound to know the law and to regulate their conduct by it. But when they act honestly and in good faith in the discharge of their duties under the law and not in violation thereof, then they will be protected.

Let the judgment of the Court below be reversed.

HENRY F. RUSSELL, Mayor, for use, etc., plaintiff in error,
vs. MICHAEL O'DOWD *et al.*, defendants in error.

MICHAEL O'DOWD, plaintiff in error, *vs.* HENRY F. RUSSELL, Mayor, for use, etc., *et al.*, defendants in error.

(TRIPPE, Judge, did not preside in these cases.)

1. Where five or six suits were pending in the name of the Mayor of Augusta for the use of various parties, against the principal and securities of an auctioneer's bond, the same defenses existing in each case, and one of the cases was tried and a verdict had, and the case carried to the Supreme Court of this State by bill of exceptions, with a *superseas*, and at the same term of the Superior Court at which this verdict was taken, the Court permitted verdicts and judgments in all the cases to be taken, and passed an order, without objection from any of the parties, directing that execution should not issue in any of said cases until the case carried to the Supreme Court was disposed of, and the case having been decided in the Supreme Court, was, by writ of error, carried to the Supreme Court of the United States:

Held, That the order staying execution in said cases, not having been excepted to, is still operative until the case is disposed of by the Supreme Court of the United States, or until said order is set aside on a motion for that purpose.

2. When it appears from the papers on file with the clerk of the Superior

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Court of this State that, in a case carried by writ of error from this Court to the Supreme Court of the United States, proper steps have been taken to supersede the judgment, the Courts of the State have no longer jurisdiction of the case until the same is disposed of by the appellate Court, or until, by order of said Court, the execution is permitted to proceed for want of a *supersedeas* or otherwise.

3. The remedy at law, by affidavit of illegality, is adequate to stop the progress of the execution, and a bill to enjoin them was properly demurred to, as the defendant has a complete and adequate remedy at law.

Supersedeas. United States Courts. Jurisdiction. Illegality. Before Judge TWIGGS. Richmond Superior Court. January Term, 1872.

Injunction. Illegality. Before Judge GIBSON. Richmond county. At Chambers. August 21st, 1872.

Henry F. Russell, Mayor of the city of Augusta, for the use of Harper C. Bryson, brought an action of debt against Clarence V. Walker, principal, and William C. Jones and Michael O'Dowd, securities, on a bond executed by said Walker as vendue master of said city. Three other suits of a precisely similar character were brought by said Mayor for the use, respectively, of William Glendenning, administrator, the Georgia Railroad and Banking Company, and of the Assignee of Swift & Horsey, bankrupts. Upon the verdict obtained against the securities in Bryson's case, judgment was entered, execution issued and was levied upon the property of Michael O'Dowd. An affidavit of illegality was filed thereto. The issue thus formed was submitted to the Court upon the following agreed statement of facts:

"Clarence V. Walker was elected, gave bond, and qualified as auctioneer of the city of Augusta, under the Act of December 24, 1827. Four suits were brought on his bond, in Richmond Superior Court, for money collected from the sale of goods, which was not paid over.

"At January term, 1871, of that Court, the first case, in favor of William Glendenning, administrator, was tried. De-

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fendants pleaded in this case the discharge of Walker as a bankrupt, and a release thereby of the securities.

“On a hearing thereof, the Court discharged Walker, holding the securities liable under the 33d section of the Bankrupt Act, and a verdict was entered against them.

“In the other three cases no plea was filed, counsel for the plaintiff recognizing the fact that the defense was the same in all the cases, and waiving the filing of pleas.

“The Judge allowed verdicts to be taken against the securities in these other three cases, but ordered as follows: ‘That execution be stayed for thirty days from the final adjournment of the Court, and if a bill of exceptions is filed therein, until the decision of the same in the case of Henry F. Russell, for the use of William Glendenning, vs. C. V. Walker *et al.*, in the Supreme Court, be made in that Court, the parties to the said cases reserving the same rights as if each and all of these cases had also been taken up under bills of exceptions, and a decision of the Supreme Court in the Glendenning case to control each case.’

“To the decision in the Glendenning case both parties to that suit excepted, O'Dowd giving as security on his *superseas* bond in that case, Peter Sheron and Patrick H. Primrose, but filing no *supersedeas* bonds in the other cases.

“The case was heard at the July term, 1871, of the Supreme Court, J. P. Carr and James C. C. Black, Esqs., appearing of counsel for O'Dowd, H. W. Hilliard, Esq., of counsel for Glendenning, administrator, and Frank H. Miller, of counsel for H. C. Bryson, Georgia Railroad and Banking Company, and the Assignee of Swift & Horsey, the three plaintiffs whose executions were suspended until the decision by the Supreme Court of Georgia.

“On the 31st day of October, 1871, the Supreme Court of Georgia affirmed the decision of Richmond Superior Court, holding the securities liable, but reversed the decision relieving Walker. The *remittitur* from the Supreme Court was filed in Richmond Superior Court, November 3, 1871.

“On the 10th of November, 1871, in the Glendenning case,

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Jones & Walker having declined to join therein, Michael O'Dowd filed in the Supreme Court of Georgia a writ of error to December term, 1871, of the Supreme Court of the United States, and a bond, dated November 7th, 1871, approved by Chief Justice LOCHRANE, for \$913 46, purporting to be in conformity to section twenty-second of the Act of Congress, of September 24th, 1789, which was executed in Richmond county, Georgia, in the presence of James C. C. Black, Esq., one of the counsel of O'Dowd, in this Court, who acted as a Notary Public in taking the bond whereon Peter Sheron and Patrick H. Primrose signed as securities. A copy of the writ of error was filed in the clerk's office of Richmond Superior Court, November 16th, 1871, and one in the Supreme Court of Georgia, November 10th, 1871.

"No writ of error or bond was filed by O'Dowd in, or reference made in the proceedings had by him, to the other cases in which executions, by order of Richmond Superior Court, were to be stayed until the decision of the Supreme Court of Georgia. No bond or writ of error has ever, in any case, been filed in Richmond Superior Court.

"A motion has been made in the Supreme Court of the United States to docket and dismiss the Glendenning case, which has been argued, but not decided. On the 16th January, 1872, judgment was entered against C. V. Walker, pursuant to *remittitur* from the Supreme Court of Georgia, and a return of *nulla bona* had thereon."

Counsel for plaintiff moved to dismiss the affidavit of illegality, under the law and the facts agreed on :

1st. Because no bond had been filed with the affidavit.

2d. Because the order of Richmond Superior Court, set forth in said affidavit of illegality, only suspended the enforcement of the above *fi. fas.* until a decision of the Supreme Court of Georgia in the Glendenning case.

3d. Because the order of the Superior Court of Richmond county, set forth in the affidavit of illegality, (the decision of the Supreme Court in the Glendenning case having been pronounced,) is now void and of no effect.

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4th. Because the said order of the Superior Court of Richmond county was entirely unwarranted, without authority of law, and a usurpation of authority, except so far and for such length of time as the plaintiffs chose to abide by it.

5th. Because said order of Richmond Superior Court was a virtual denial of the right of plaintiffs to have security on *supersedeas* bonds, while the case of Glendenning was pending in the Supreme Court, and can no longer be enforced.

6th. Because the persons signing as securities on the *supersedeas* bond, dated November 7, 1871, and filed in the clerk's office of the Supreme Court, at Atlanta, November 10th, 1871, are the same persons who are sureties on the *supersedeas* bonds filed in the Glendenning case in the clerk's office of Richmond Superior Court, April 28th and May 16th, 1871, and being already bound by the judgment of the Supreme Court of Georgia, the new bond signed by them is a nullity.

7th. Because no copy of the writ of error to the Supreme Court of the United States was filed in the clerk's office of Richmond Superior Court, where the records in the case are kept, until Tuesday, 16th of November, 1871, when the same should have been filed within ten days, (Sunday exclusive,) from October 31, 1871, pursuant to section 22, Act of Congress of September 24, 1789.

8th. Because no citation was served on Glendenning, administrator, twenty days prior to the December term of the Supreme Court of the United States, as required by section 22, Act of Congress, September 24, 1789.

9th. Because executions can issue at any time in Georgia, (Code, 3569,) and where cases are affirmed by the Supreme Court, on filing the *remittitur*: Code, 4224. The Act of Congress of September 24, 1789, section 23, relating only to practice in the United States Court.

The Court (Judge Twiggs) sustained the affidavit of illegality, and overruled the motion. Whereupon, plaintiff in execution excepted.

Upon the verdicts rendered in the cases of the Mayor, for the use of the Georgia Railroad and Banking Company, and

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the Mayor, for the use of the assignee of Swift & Horsey, bankrupts, judgments were entered, and executions issued and were levied upon the property of O'Dowd. He filed his bill, setting forth, substantially, the same facts as were agreed upon on the trial of the issue formed upon the affidavit of illegality in the Bryson case, praying that the aforesaid plaintiffs in *fi. fa.* be enjoined from enforcing said executions, or either of them, until the case of the Mayor, for the use of William Glendenning, administrator, shall have been finally heard and adjudicated.

The Chancellor (Judge Gibson) refused the injunction, and complainant excepted.

These two cases were argued and decided together in the Supreme Court.

FRANK H. MILLER, by brief, for the plaintiff in error in the first case, and for the defendant in error in the second.

JOSEPH P. CARR, by brief, for the defendant in error in the first case, and for the plaintiff in error in the second.

McCAY, Judge.

1. It may be true, that the order directing these cases to be stayed until the bill of exceptions in the first case was disposed of was not a wise and just order, though of that we express no opinion. It was not excepted to and it was the judgment of a Court with full jurisdiction, and until it is set aside by proceedings for that purpose, it is to be treated as conclusive between the parties. We suspect, too, that the order was by consent, though of that we are not informed. At any rate, it would be contrary to first principles to permit a judgment between the parties by a Court having jurisdiction of the whole subject, to be treated as null in a collateral way, without any charge of fraud. We are, therefore, clear that the plaintiffs cannot go on to execute their judgments in the face of this order. We are clear, too, that this order is still operative. It appears from the record that the bill of

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exceptions was filed in the Glendenning case, and that the condition of the order was complied with. It appears further, that there has been no final decision of the Glendenning case, the judgment of this Court having been carried by writ of error to the Supreme Court of the United States.

2. Without question there has been a writ of error. Whether it is strictly regular, whether it has been properly served and filed, etc., are not questions for the Superior Court of Richmond county to pass upon. The case is on the docket of the Supreme Court, it has jurisdiction of it, and all such questions as it seems to us must, in the nature of things, be made there. It appears, too, that proper steps have been taken to supersede the judgment of this Court. Whether the officer who approved the bond failed to inquire properly into the sufficiency of the sureties, whether he has taken such a bond as adds nothing to the security of the plaintiff in the judgment, is, in our opinion also, not a question for the Superior Court of Richmond county, nor is it for this Court. Upon the record it appears that the Act of Congress has been complied with, whether the record in the Federal Court shows the same thing we do not know. But until some *judgment* is had by that tribunal, permitting the judgment of this Court to go on, it is by the record stayed. We have this to say in addition. The judgment of this Court was that the principal debtor was liable. Even if there has been no *supersedeas* of that judgment, we should question the right of the plaintiffs to go on against the two securities with the executions. If I am not mistaken, the effect of the judgment of this Court was to grant a new trial. And the sureties have a right to have the principal joined with them in the judgment and execution.

3. As the remedy by affidavit is ample and complete, there was no necessity for a bill, and we think the Judge did right in refusing an injunction. .

. Judgment affirmed.

Hewitt vs. Brummel.

WILSON C. HEWITT, plaintiff in error, vs. **MARY A. BRUMMEL**, defendant in error.

1. Where A. sues H. as bailee for money deposited with him for safe-keeping, and H., who was a partner in business with B., the husband of A., sets up that the money was put into the partnership by B., it was not error in the Court to decline to charge, at the request of H., that if the claim of A. be true, yet if B. put the money into the concern of H. and B., the suit should have been brought against B., or against H. and B. The non-joinder of B. should have been pleaded in abatement, in order for H. to avail himself of it. And H. was not entitled to the charge as to the suit being brought against B. individually, unless it had contained the qualification that H. did not know the money belonged to A., when it was so put into the concern of H. and B.
2. In such a suit, a receipt from B. to H., showing a dissolution of the firm, which had already been proven, and a settlement between them of the partnership business was immaterial testimony, and could not affect the rights of A.
3. Where such deposit was \$950 00 in gold, and, after demand and refusal, an action of assumpsit was brought for that amount of gold, "or its value in currency," the plaintiff was entitled to recover the value of the gold at the time of the demand, with interest; and as no evidence was introduced on the trial showing it was worth any premium at that time, the recovery could only have been for \$950 00, with interest from the time of the demand. The City Court of Augusta, whose jurisdiction is limited to \$1,000 00, therefore, had jurisdiction of the case.
4. While it may not have been altogether proper for the Court to have said to the jury, "That if they did not make haste, he should not be there to receive the verdict, as the Court room would be occupied in a few minutes by a democratic meeting," yet it does not require that the verdict should be set aside therefor, on the ground that the jury were unduly hastened by it in their deliberations, when the Court immediately added: "You will then seal your verdict and return it in the morning."
5. If there be positive evidence to support the verdict, though conflicting with other evidence, and the Judge who tries the case refuses to set it aside on the ground that it is against the weight of the evidence, this Court, as it has often decided, will not interfere, unless the verdict is so decidedly against the weight of the evidence as to be evidently the result of prejudice, or other wrong or illegal influence or motive.

Bailment. Partnership. Pleading. Evidence. Jurisdiction. Immaterial error. Jury. New trial. Before Judge GOULD. City Court of Augusta. May Term, 1872.

Hewitt vs. Brummel.

Mary A. Brummel brought assumpsit against Wilson C. Hewitt, on an account for \$950 00 in gold coin or its value in currency, received from her for safe keeping on May 21st, 1869. The declaration also contained a count for money loaned, and one for money had and received.

The defendant pleaded the general issue, and further that the plaintiff ought not to have or maintain her aforesaid action against him, for the reason that the money, the subject matter of this suit, which the plaintiff now claims to be and to have been, at the time it went out of her possession, her separate and individual property, was controlled, appropriated and used by Joseph Brummel, the husband of the plaintiff, in the business of W. C. Hewitt & Company, of which firm the said Joseph was then and there a co-partner, and as a part of his contribution to the capital stock of said firm, it being in amount only a part of the full sum which he had undertaken and promised to contribute.

The above synopsis of the pleadings shows the issues involved sufficiently to a clear understanding of the decision, and the evidence is therefore omitted.

The jury returned a verdict in favor of the plaintiff for the amount sued for with interest from January 9th, 1872. The defendant moved for a new trial upon the following grounds:

1st. Because the verdict was contrary to the evidence and the law.

2d. Because the Court erred in refusing to charge the jury as follows: "If you believe from the evidence that the claim of plaintiff is true, and yet that Brummel put the money into the concern of W. C. Hewitt & Company, this suit should have been brought against Brummel or W. C. Hewitt & Company."

3d. Because the Court erred in refusing to admit in evidence the following receipt, it having been shown that Joseph Brummel and the defendant were in business together as co-partners, and that Brummel assisted in the sale of the gold,

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and in person deposited the proceeds in the National Bank of Augusta, and himself put it into the business of W. C. Hewitt & Company :

“Received, Augusta, Georgia, January 7th, 1871, of Mr. W. C. Hewitt, seven hundred and fifty dollars, (\$750 00) being in full for my entire interest in the partnership business carried on at No. 282 Broad street, Augusta, Georgia, under the firm name and style of W. C. Hewitt & Company (this day dissolved,) to-wit: all the stock on hand, debts due the concern, whether by notes, due-bills, open accounts or otherwise, said W. C. Hewitt assuming all the liabilities and contracts heretofore made in the name of the firm.

(Signed)

“JOSEPH BRUMMEL.”

4th. Because the amount sued for, to-wit: \$950 00 in gold coin, was beyond the jurisdiction of the City Court, which only extends to \$1,000 00 in currency, and, therefore, the suit should have been dismissed.

5th. Because the Court erred in remarking to the jury at the close of the charge, as follows: “Gentlemen, if you do not make haste, I shall not be here to receive your verdict, as this hall will be occupied in a few minutes by a democratic meeting.” The effect of such remark being to defeat that deliberation which a jury should, in all cases, exercise.

The motion was overruled, and the defendant excepted.

HOOKE & GARDNER, for plaintiff in error.

JOHN T. SHEWMAKE; JOHN S. DAVIDSON, for defendant.

TRIPPE, Judge.

1. The defendant did not plead in abatement the non-joinder of Brummel, nor did the non-joinder of a necessary party appear upon the face of the pleadings. He was not, therefore, entitled to a motion for a non-suit, nor to the first charge requested, in so far as it applied to the suit being brought against Hewitt & Company. This, of itself, relieved the refusal of the Court to give the written request in charge,

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from being error: 1 Chancery Pleadings, 46. But that portion of the request that refers to an action against Brummel, individually, should have been qualified by the proviso that Hewitt did not know the money belonged to Mrs. Brummel, for under the facts proven by the plaintiff, as to the ownership of the money and Hewitt's knowledge of it, both Hewitt and Brummel would have been responsible had the firm used it, even by Brummel's authority.

2. The plaintiff claimed that Hewitt was the bailee of the money, and used it in the firm business. If so he was liable. The defendant replied that it was Brummel's money, or if it was his wife's he did not know it, and that Brummel put it into the co-partnership. The firm had been dissolved, and Hewitt had a receipt of a full settlement with his co-partner, showing that he, Hewitt, succeeded to all the assets and was to discharge all the liabilities. We do not see how that receipt could illustrate the question of Hewitt's liability on this bailment to Mrs. Brummel, or how her rights could be affected by it.

3. The suit was for \$950 00 in gold, or its equivalent in currency. The plaintiff made a demand in January, 1872, and there was a verdict for \$950 00, with interest from the 9th January, 1872. There was no proof of the value of gold at the time of the demand or afterwards. The Court cannot judicially take cognizance of the fact whether or not gold is worth a premium over currency, or if so, what that premium is. The verdict is for currency. Therefore, it was not shown by the pleading—for the value of the gold was not alleged—nor by the proof, nor by the verdict that the claim was beyond the jurisdiction of the City Court. That jurisdiction is limited to \$1,000 00. The plaintiff was only entitled to recover what was due her at the time of the demand, to-wit: 9th January, 1872, with interest. She only proved \$950 00 in gold, without any proof as to its value at that time or afterwards. The action was in assumpsit, or complaint on contract. The pleader entitled it at the conclusion of the decla-

ration "petitioner's demand." It certainly is not an action of trover.

4. We cannot think the defendant was injured by the Court's remarking to the jury that if they did not make haste he would not be present to receive their verdict, as the Court-room would in a few minutes be occupied by a public meeting, and adding immediately, "You can then seal your verdict and return it in the morning." The objection is not that the privilege was given to the jury to seal their verdict. This would have allowed them to disperse. But we suppose the parties consented to that, at least it does not appear that the jury did disperse before rendering their verdict. Defendant complains that the remark tended to unduly hasten the jury in their deliberations. This might have been true, had the right not been given them, in case they did not soon agree, to seal their verdict and disperse. This relieved it from being an injunction that might otherwise have given even the jury a right to complain. It was a remark, after all, which was as apt to injure one party as the other, provided either was liable to be injured by it, modified as it was by the right extended to the jury. .

5. The evidence was very conflicting; indeed, on the main question, positively contradictory. There was no such preponderance on either side to authorize this Court to set the verdict aside, over the refusal of the Court below so to do, no matter for whom it had been. There were seemingly inexplicable circumstances on both sides. It was hard to tell exactly where the truth did lie. The sole responsibility as to that, in such a case, must be on the jury.

Judgment affirmed.

Sullivan vs. Hugely.

H. H. SULLIVAN, plaintiff in error, vs. MASON J. HUGELY,
defendant in error.

(TRIPPE, Judge, having been of counsel, did not preside in this case.)

1. Where no ground of illegality to an execution is based upon the fact that no affidavit of the payment of taxes had been filed by the plaintiff, the levy will not be dismissed on motion, on account of its absence. (R.)
2. Where the questions as to whether the note which was the basis of the judgment from which the execution issued, was given for Confederate money or in renewal of another note, only become material in connection with whether the taxes have been paid, and this issue was not made by the affidavit of illegality, it was not competent to introduce testimony upon these points. (R.)
3. Where a proposition is made by the principal debtor in the judgment to pay less than one-half in satisfaction thereof, to which the plaintiff assented provided the payment should be made within thirty days, this, without more, did not injure the surety or increase his risk, or expose him to greater liability, by which he would be discharged. (R.)

Illegality. Tax-affidavit. Evidence. Principal and surety. Before Judge COLE. Crawford Superior Court. September Term, 1872.

This case will be found fully reported in the motion for a new trial here given, and decision of the Court.

The defendant moved for a new trial upon the following grounds:

1st. Because the Court erred in refusing to dismiss the levy because no affidavit of the payment of taxes had been filed.

2d. Because the Court erred in excluding all testimony going to show the consideration of the note which was the basis of the judgment from which the execution issued, to have been Confederate money.

3d. Because the Court erred in permitting to be read to the jury the following entry upon the execution, to-wit: "There was paid on the judgment upon which this *fi. fa.* is founded, \$63 10. December 3d, 1870." This entry was not tendered in evidence. Hugely, the plaintiff, when testifying, stated that the amount mentioned in said entry was the same as was

set forth in the receipt which was in evidence, except that there was a mistake of one dollar in the amount.

4th. Because the Court erred in holding and charging the jury, "That the only question made by the affidavit of illegality was, whether or not the *fi. fa.* had been paid off or settled," and in not submitting to the jury the discharge of the security, Sullivan, further than by payment or settlement of the judgment.

5th. Because the Court erred in refusing to charge the jury, "That if Hugely, at any time after the making of the note or due-bill, accepted it as payment, the judgment was satisfied."

The motion for a new trial was overruled, and the defendant excepted upon each of the grounds aforesaid.

JAMES S. PINCKARD; HAMMOND & STONE, by A. W. HAMMOND & SON, for plaintiff in error.

T. B. CABANISS, by PEEPLES & HOWELL, for defendant.

WARNER, Chief Justice.

This case came before the Court below on an issue formed upon an affidavit of illegality to an execution. On the trial thereof the jury found a verdict in favor of the plaintiff. A motion was made for a new trial on the several grounds specified therein, which was overruled by the Court, and the defendant excepted.

On the 24th day of August, 1871, an execution was issued in favor of the plaintiff against Dannelly, as principal, and Sullivan, as security, for the sum of \$559 47, principal, and \$104 30, interest, up to the 1st of September, 1866, when the judgment was obtained. The execution was levied by the sheriff on the property of Sullivan, the security, on the 26th day of April, 1872. On the 29th day of April thereafter, Sullivan filed an affidavit of illegality to the execution, because said execution has been settled, discharged and fully paid off by Francis Dannelly, and because deponent was se-

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curity on said execution and has been discharged from all liability upon the same by reason of said settlement being made without deponent's knowledge or consent. There was no error in the ruling of the Court as to the affidavit of the payment of taxes, that question was not made by the defendant in his affidavit as a ground of illegality to the execution, and, therefore, was not made an issue in the case to be tried.

There was no error in ruling out the evidence as to the consideration of the note prior to the judgment as to whether it was given in renewal of another note, or for Confederate money; the renewal of the note would not be material except as to the question of the payment of taxes on the debt, and that question was not put in issue by the defendant's affidavit of illegality.

The issue on trial was whether the execution was illegal on the grounds stated in the defendant's affidavit. The entry on the *fi. fa.*, that \$63 10 had been paid, dated 3d December, 1870, but not signed by anybody, it appears by reference to the third ground of the motion for a new trial, was not tendered in evidence as testimony, but the plaintiff, when on the stand as a witness, explained it by saying it was the same money as that specified in the receipt, only that there was a mistake of \$1 00 in the amount; there was no error in relation to that point in the case.

It appears from the evidence in the record, that some time in the year 1870, the plaintiff asked the defendant, Dannelly, at the church, what he was willing to pay on the judgment, (Sullivan not being present) defendant said he was willing to pay \$240 00, which plaintiff agreed to accept in satisfaction of the judgment, and the plaintiff states that he told the defendant, Dannelly, he did not mind giving him thirty days to pay the money. Some short time after this conversation, Dannelly sold a bale of cotton and went to the plaintiff's house and paid him \$64 10, and took from the plaintiff the following receipt: "Received \$64 10 upon the settlement on the judgment of M. Hugely *vs.* F. Dannelly. December 3d, 1870." At the same time Dannelly gave plaintiff his due-bill for

the balance of the \$240 00. A few days afterwards, Dannelly states that he went to the plaintiff's house to have the judgment settled, plaintiff was not at home, left a few lines for him with plaintiff's wife, asking him to have the judgment satisfied, or send him his note; the plaintiff did not do either, and the note remained in plaintiff's possession.

Hugely and his wife both state that when the due-bill or note was written by Dannelly, plaintiff refused to take it in payment of the judgment, that Dannelly left it on the table, where Mrs. Hugely found it with other papers, and she put them all in the drawer.

It also appears in the record that Dannelly, at the time of this transaction, did not have any more property than was exempt from levy and sale, but that Sullivan was entirely solvent. The main question in the case was whether the fact of Dannelly's leaving his due-bill with the plaintiff, and the same remaining in his possession under the circumstances as shown by the evidence, was a payment of the balance of the \$240 00 which the plaintiff agreed to take in satisfaction of the judgment. The Court charged the jury that the only question made by the affidavit of illegality was whether or not the *fi. fa.* had been paid off or settled, but did not submit to the jury as to whether the security was discharged other than by the payment or settlement of the judgment, and this is assigned as error.

The defendant's counsel requested the Court to charge the jury, "That if the plaintiff, at *any time after making the note or due-bill*, accepted it as payment, the judgment was satisfied;" which request the Court refused, and this is assigned as error.

There was no error in the charge of the Court to the jury in view of the facts of this case. There was a proposition made by the principal debtor on the judgment to pay less than one-half of it in satisfaction thereof, to which proposition the plaintiff assented, provided he would do so within thirty days; this proposition by the principal debtor in the judgment, and the assent of the plaintiff thereto, without more, did not in-

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jure the surety, or increase his risk, or expose him to any greater liability. There was no agreement not to enforce the judgment against the principal for a consideration, or to indulge him at all, but the proposition assented to by the plaintiff was, if you, the principal defendant, will pay \$240 00, less than one-half of the judgment, within thirty days, I will take it in full satisfaction of the judgment, and the question was, whether such payment had in fact been made; there was no other question in the case. Had the judgment been satisfied by the payment of the money under the proposed settlement of it?

The second ground in the affidavit of illegality is based on the fact that there had been such a settlement of the judgment by the principal debtor, and hence the whole question turned upon the fact whether the proposed settlement of the judgment had been made. There is no evidence in the record that the plaintiff, at any time after the making of the note or due-bill, accepted it as payment, or agreed to do so, and it would have been very strange conduct on his part under the facts, if he had done so. There was no error in the refusal of the Court to charge as requested upon this point in the case. This is a very *adroit* attempt to pay off the balance of the \$240 00 with the defendant's insolvent note or due-bill. If it had been intended to have been a payment in full, why did not the receipt taken at the time specify that the full amount of the \$240 00 had been paid instead of the \$64 10 paid in cash?

The verdict of the jury was right under the law and the evidence contained in the record, and we will not disturb it. Let the judgment of the Court below be affirmed.

Jackson vs. Hitchcock.

ALEXANDER J. S. JACKSON, guardian, plaintiff in error, vs.
SAMUEL C. HITCHCOCK, defendant in error.

1. Samuel C. Hitchcock having been appointed guardian of Irby Hudson, by the Ordinary of Sumter county, moved his guardianship in terms of the law to Hancock county. On the arrival of Hudson at the age of fourteen years, Hitchcock was, by petition, removed on the ground that Hudson was now fourteen years old, and had chosen another guardian. This was done in the county of Hancock. Soon after, A. J. S. Jackson was appointed guardian of Hudson, whose residence was then in Greene county. Jackson, the new guardian, cited Hitchcock, who resided in Fulton county, before the Ordinary of Greene county, to account. Hitchcock acknowledged service of the citation, but did not appear, and on an *ex parte* hearing the Ordinary gave a judgment against Hitchcock. An execution was issued and levied, and Hitchcock filed an affidavit of illegality on the ground that the Ordinary of Greene county had no jurisdiction to call him to account: *Held*, That as the Ordinary of Greene county did not have the record of Hitchcock's guardianship, and as Hitchcock had never been appointed by him or been in any way subject to his jurisdiction, said Ordinary had no power to call him to account or to give a judgment against him.
2. The acknowledgment of service of the citation was no waiver of the jurisdiction, and as Hitchcock did not appear or plead to the citation, the judgment was void, and the remedy by affidavit of illegality may be used to make the question of jurisdiction.

Guardian and ward. Jurisdiction. Illegality. Waiver. Service. Before Judge ROBINSON. Greene Superior Court. September Term, 1872.

The petition of Samuel C. Hitchcock, former guardian of the person and property of Irby Hudson, a minor, to the Superior Court of Greene county, for the writ of *certiorari*, made the following case:

At the April term, 1872, of the Court of Ordinary of said county, there came on to be tried an affidavit of illegality filed by petitioner to an execution founded on a judgment rendered against him by said Court, at the December term, 1871, on a proceeding commenced by Alexander J. S. Jackson, of said county, as guardian of said minor, for an account and settlement.

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The grounds of illegality were as follows:

1st. Because the Court rendering the judgment upon which said execution was based had no jurisdiction of the proceeding, for the reason that petitioner never was a resident of the county of Greene, but, on the contrary, during the entire period for which he was the guardian of the said Irby Hudson, his residence was either in the county of Hancock or the county of Fulton.

2d. Because the Constitution of the State of Georgia requires that all suits shall be brought in the county of the residence of the defendant, and a judgment rendered in any other county is null and void.

The proceeding instituted as aforesaid against petitioner was purely *ex parte*. He acknowledged service and waived publication of notice, but refused to waive the jurisdiction of the Court. Petitioner did not appear and made no defense to said proceeding. He was originally appointed guardian of said minor in the county of Sumter, but subsequently the guardianship was regularly removed to the county of Hancock. When the said minor reached the age of fourteen years, he selected said Jackson as his guardian, and petitioner's letters were accordingly revoked, he making his last return to the Court of Ordinary of Hancock county. At the August term, 1871, of the Court of Ordinary of Greene county, in accordance with the selection of said minor, Jackson was duly appointed guardian. All of these facts were made to appear upon the trial of the aforesaid illegality, yet the Court of Ordinary of Greene county overruled the same, and ordered the execution to proceed. Prayer, that the writ of *certiorari* may issue.

The petition was sanctioned and the writ issued.

The Superior Court, upon the trial, sustained the *certiorari*, holding that all the proceedings in the county of Greene were null and void as against petitioner, the Court of Ordinary having acted without jurisdiction. Jackson, guardian, excepted to this ruling, and now assigns the same as error.

EDWARD L. LEWIS; JOHN C. REED, for plaintiff in error.

BENJAMIN F. ABBOTT, for defendant.

McCAY, Judge.

1. Whatever may be the power of an Ordinary under our Constitution and laws over a guardian appointed by him and bound by the tenure of his letters to report to and obey the legal orders of the grantor of his letters, we are very clear that under the facts of this case the Ordinary of Greene county had no such power over Hitchcock. Hitchcock, after the removal of his guardianship to Hancock, became an officer of, and amenable to the Ordinary of Hancock. Whilst he was guardian he was bound to make his returns there,—there was his bond—there the record of his letters, his returns and a full record of his acts. The power of the Ordinary to call him to account turns upon the fact that he is a *quasi* officer of the Court, and that by coming into that Court of his own motion he has consented to its summary jurisdiction. None of this reasoning applies to the Ordinary of Greene. He does not even officially know that Hitchcock ever was guardian. He does not have any bond from him, he has no record of his letters, returns, or of any of his acts. The idea of an account is to go over *the records*—the originals—over the actual signature of the guardian, and state the account. To do this the Ordinary must have the records, or if the guardianship has been removed, the copies adopted as originals at the removal. In this case the Ordinary of Greene called on Hitchcock to account when there was not among his records a particle of evidence that Hitchcock had ever been guardian at all, much less had he ever been an officer or appointee of the Ordinary of Greene county, or been in any respect subject to his orders. It was, however, contended on argument that on the discharge of Hitchcock by the Ordinary of Hancock, and the removal of the ward to Greene, jurisdiction over the whole guardian-

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ship, past, present and future, vested in the Ordinary of Greene. There is no positive law so declaring, and if this be the law, it is only because it arises from the nature of the thing, or that such a jurisdiction is necessary in order to give effect to the right to appoint a new guardian. Is this so? May not the Greene county Ordinary exercise every function necessary to appoint and superintend the conduct of new guardians without the power claimed for him? True, he cannot put the new guardian in possession of the effects. But he cannot do that in any case. Even if Hitchcock were his appointee, he could not proceed then against him as a part of his jurisdiction over the new guardian, or over the guardianship, but by notice of his having appointed Hitchcock. Can our law be that the Ordinary having present jurisdiction of a guardianship may call all previous guardians to account whenever they may have been appointed? If Jackson should move his guardianship to Rabun, and thence to Charlton, does jurisdiction over Hitchcock follow to the Ordinary of Charlton? It seems to us that this is absurd. As we have said, the only defense of the constitutionality of the law itself turns upon the fact that Hitchcock has voluntarily consented to become an appointee—a trustee—a *quasi* receiver of the Ordinary of Hancock county—has given him a bond, a recognizance, an obligation, upon his records, that he will account, and having so done, he is amenable to such process as belong to that officer to compel the performance of that *record* undertaking. Hitchcock has not done this to the Ordinary of Greene county, and that Ordinary has nothing upon *his records* to justify his proceeding in this way against the appointee of the Ordinary of Hancock. We do not pass positively upon the question whether the sections of the Code, authorizing the Ordinaries to hear, determine and issue execution upon questions of account, are in accord with the Constitution. We decide that the Ordinary of Greene had no jurisdiction. Whether some other Ordinary had, is not properly before us.

2. The mere acknowledgment of service and waiver of pro-

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cess admits nothing, but puts the party in precisely the same situation as though process were annexed and service effected by the proper officer: Revised Code, 3261. One is not bound to appear, even though served before a Court having no jurisdiction. The judgment is void, and may be treated as such whenever and wherever it is sought to be enforced: Revised Code, 3536. By *appearing and pleading* to the merits, jurisdiction is admitted: Revised Code, 3409. Here was no appearance and plea, and the judgment is simply null, with nothing, not even appearance, to justify it. It is therefore illegal, the execution is illegal, the levy illegal. This Court has on several occasions held that in such cases illegality will lie. And this, too, is recognized by the Code: Revised Code, section 3621. A man cannot be said to have had his day in Court if the Court have no jurisdiction of the matter, he having not appeared.

Judgment reversed.

RODDY T. HARPER, plaintiff in error, *vs.* WRIGLEY & KNOTT, defendants in error.

1. The maker of a promissory note, payable to a partnership, at sixty days, cannot set up a defense against the note that it was agreed between him and two of the partners, when the goods were bought and the note given, that it should be settled at a future time by being credited on an account held by the maker on one of those two partners, the other partner not being a party to such agreement.
2. The evidence introduced by the defendant was sufficient to show that the partnership was composed of three partners, and to require the charge of the Court and the verdict.

New trial. Partnership. Set-off. Before Judge HARRELL. Terrell Superior Court. May Term, 1872.

Wrigley & Knott brought complaint against Roddy T. Harper upon a note dated July 15th, 1868, and due sixty days after date, for \$222 97, and on an open account for

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§26 34. The defendant pleaded the general issue, and further that at the time said note was given J. W. Knott, of the same firm with plaintiffs, was indebted to the defendant in the sum of \$412 08, and it was understood between the plaintiffs and the defendant that said note and said account sued on should be settled and liquidated by crediting said account against J. W. Knott with the amounts of said note and account.

Upon the trial the evidence made the following case:

The firm of Wrigley & Knott was composed of Benjamin H. Wrigley, William L. Knott and J. W. Knott. J. W. Knott was indebted to the defendant on an account in the sum of \$570 00. The defendant went to Macon to see J. W. Knott about this claim. He was out at home sick. Wrigley went with him in a buggy to Mr. Knott's house. Knott said he had no money, but that if defendant wanted any goods he could buy them in the store of Wrigley & Knott, and let them go as a payment on the account, and that he would bring the account as soon as he was able and have a settlement. Wrigley consented to this arrangement. Defendant bought goods to the amount of \$222 00 under this arrangement. After the purchase was made Wrigley requested him to give his note for the amount to save the trouble of making an entry on the books, and said that Mr. Knott, when he came down would take it with him and settle it by letting it go on the account. Defendant signed the note to accommodate Mr. Wrigley. William L. Knott was in the store and assisted in selling the goods to defendant. Defendant did not know that he was a partner, or that J. W. Knott was a partner. It was the general understanding that J. W. Knott was a member of the firm. The account sued on had been paid.

The jury returned a verdict for the amount of the note sued on, principal and interest. Whereupon, the defendant moved for a new trial, upon the following grounds, to-wit:

1st. Because the verdict was contrary to the law and the evidence.

2d. Because the Court erred in charging the jury, "That

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if William L. Knott was a member of the firm of Wrigley & Knott when said note was given, then the defendant could not set up against said note the agreement between himself and Wrigley and J. W. Knott."

• The new trial was refused, and the defendant excepted upon each of the grounds aforesaid.

C. B. WOOTEN, for plaintiff in error.

F. M. HARPER, represented by CLARK & GOSS, for defendants.

TRIPPE, Judge.

1. In the cases of *Wise vs. Copley, Stone & Company*, and *Riddle vs. the same*, 36 Georgia 508, the old and well settled rule was reannounced, "that one partner cannot dispose of the partnership property in payment of his individual debt without the consent of his co-partners, either express or by necessary implication." The reason of this rule is obvious, and that a contrary one would be dangerous and mischievous, is also apparent. In the present case it does not appear that W. L. Knott, one of the partners, was consenting to or cognizant of the arrangement made by Wrigley and the other partner with the creditor of that partner as to the payment of his debt with the partnership assets. Besides, when the creditor got the goods he gave his note at sixty days, payable at a bank, and that is the note on which suit is brought, and to which this defense is made. Had the contract between Wrigley, J. W. Knott and the creditor been fully executed by a transfer to the firm of the creditor's claim on J. W. Knott in payment of the goods purchased, and no note or other credit given on the purchase of the goods, the case might have been different. In such a transaction there would be the purchase by the authority of one disinterested partner, of a debt on another partner, and it might not be obnoxious to the charge of being in violation of the rule above stated. Nor do we mean to decide what would have been the equities of Harper, the

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creditor of J. W. Knott, as against Wrigley & Knott, in so far as he may have had a right to a verdict so moulded as to have limited the recovery to the interest of W. L. Knott, provided a necessity for it had been shown, and the pleadings and evidence would have allowed it.

2. The evidence was sufficiently conclusive of the fact that W. L. Knott was a partner, so as to have justified the charge of the Court excepted to, and the verdict.

Judgment affirmed.

WILLIAM H. YOUNG, plaintiff in error, vs. CHARLES D. MOODY, defendant in error.

1. Upon the trial of a case it is improper for the Court to remark as follows: "He was obliged to admit the evidence because it did bear, though very remotely, on the issue to be tried. He wished he could exclude it, but he could not. The course of the counsel, however, will not be likely to avail him much before the jury." But, if the evidence, independent of that to which the remarks of the Court applied, requires the verdict rendered, a new trial will not be ordered. (R.)
2. Where M. had cotton stored at a warehouse, and sold forty-three bales to Y. for himself, and fifty-six bales to him as the agent of E., and one hundred and seven bales to him as the agent of W., and the bills for the cotton being made to Y. because he told M. that he would pay the storage, and the question on trial was whether Young was responsible for the storage of any more of the cotton than the forty-three bales purchased for himself:
Held, That this depends upon the fact whether the credit was given to Y. for the storage of the entire lot, or whether any part of it was stored on the credit of E. or W. (R.)
3. The presiding Judge may exercise a sound discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against the weight of evidence, although there may appear to be some slight evidence in favor of the finding. (R.)

Court and counsel. Practice. Statute of frauds. Contracts. New trial. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1872.

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For the facts of this case, see the decision.

R. J. MOSES, for plaintiff in error.

PEABODY & BRANNON; B. A. THORNTON; BLANDFORD & CRAWFORD, for defendants.

WARNER, Chief Justice.

The plaintiff brought his action in the Court below against the defendant on an open account for the storage of two hundred and forty-six bales of cotton. On the trial of the case the jury found a verdict for the plaintiff for the sum of \$627 00, with interest. The defendant made a motion for a new trial, on the following grounds:

1st. Because during the trial of said cause defendant by his counsel, asked Charles Moody, the plaintiff, he being on the stand as a witness, "What is the annual value of your warehouse in Alabama?" To which the plaintiff objected, when the Court remarked, "It was obliged to admit the evidence, because it did bear, though very remotely, on the issue to be tried. He wished he could exclude it, but he could not. The course of the counsel, however, will not be likely to avail him much before the jury."

2d. Because the Court erred in refusing to charge the jury, "That if the cottons of Wright and the Eagle Factory were on storage with Moody, and after the cottons were so stored, Young agreed verbally with Moody that he would be responsible for the storage, this would be the promise to pay the debt of another, and must be in writing to bind the defendant. In order to bind Young by his verbal promise, the evidence must show that the cotton was originally stored by Moody for Wright and the Eagle Factory on the promise of Young that he would pay the storage."

3d. Because the verdict is excessive, contrary to the evidence, and strongly against the weight of the evidence. The Court overruled the motion, and the defendant excepted, and assigns the same for error.



As to the first ground of error assigned in the record, we may remark, that a Court is a place where justice is judicially administered, and that the business of the Court should be so conducted by the presiding Judge as to accomplish that object with dignity and impartiality; whilst the Court must necessarily exercise its legitimate power and authority, in conducting the business before it, one of the first duties of counsel is to yield a respectful obedience to that authority. The sovereign authority of the State is represented in her Courts of justice.

The expressions of the presiding Judge, as set forth in the record, were uncalled for, and in our judgment, were improper. If the evidence was admissible under the law, then it was the duty of the Court to have admitted it, without expressing its wishes in regard to it. If the evidence was not admissible, then the Court should have ruled it out; the Court cannot be presumed to have any other wishes than to administer the law, and if it has, it is improper to express them in the progress of the trial. Whether these remarks of the Court, in relation to that evidence, will entitle the defendant to a new trial under the facts of the entire case, is a different question.

It is not very apparent what the annual value of the plaintiff's warehouse had to do with the defendant's liability to pay for the storage of his cotton in that warehouse, and that evidence, if it had any bearing at all upon the question at issue between the parties, was so remote that if the Court had rejected it we should not have set aside the verdict on that account. The Court, however, in the bill of exceptions, in explanation of the cause of the remarks, also states, that the jury were told by the Court that what had taken place between the Court and the counsel should not influence them, but that they would be controlled by the law and the evidence.

In view of the evidence contained in the record, wholly independent of that to which the remarks of the Court apply, the verdict should not be set aside on that assignment of error. The Court refused to give the charge as requested in the language expressed therein, but did charge the jury that if the

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credit was given to Young, he was liable on his parol promise, and if the credit was not given to Young, he was not liable. The charge, as requested, assumes that there was evidence that the plaintiff received the cotton of Wright, and of the Eagle Factory on storage *for them*, whereas there is no evidence in the record to sustain that assumption. The evidence is that the plaintiff was the owner of the cotton, had it stored in a warehouse in Tuskegee, intended to hold it during the war, but concluded to sell it; sold eighty-three bales to Young, the defendant, for himself, and fifty-six bales to him as agent for the Eagle Factory, and one hundred and seven bales as agent for Wright, who was then in Europe; the bills for the cotton were made to Young, because he told the plaintiff that he would pay the storage, that he need have no fear about the storage, as he, Young, would be responsible, and if plaintiff took care of the cotton, he, Young, would pay him good. This is the contract as proved in relation to the storage of the cotton. The question on the trial was, whether Young agreed to be responsible to the plaintiff for the storage of any more of the cotton besides the eighty-three bales purchased for himself, or whether he agreed to be responsible to the plaintiff for the storage of the cotton purchased by him as the agent of the other parties, and that depends upon the fact whether the credit was given to Young for the storage of the entire lot, or whether any part of it was stored on the credit of Wright or the Eagle Factory. There is no evidence of any credit for the storage of any part of the cotton having been given by the plaintiff to Wright, or to the Eagle Factory. Jackson, the clerk of the plaintiff, states that the three accounts shown him at the trial were made out, he thinks, by the direction of Young, for his convenience in charging to the respective parties their part of the storage. There does not appear to have been anything strange or unreasonable in giving the credit to Young for the storage of the cotton which he purchased as agent, when one of his principals was in Europe, and the other resided in a different State than that in which the cotton was stored, the more especially as it appears

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from the evidence that Young was the treasurer of the Eagle Factory.

The point in the case is, to whom was the credit given by the plaintiff for the storage of the cotton at the time the contract was made for the storage of it. In view of the evidence in relation to that point, there was no error in refusing the charge as requested, and in charging the jury as the Court did.

As to the verdict being contrary to evidence and the weight of the evidence, that depends entirely on the credit the jury gave to the testimony of the plaintiff's witnesses. If the jury believed them, as it was their province to do, then the verdict is not against the evidence. The discrepancy or inconsistency in the plaintiff's accounts, or in his statements in relation thereto, all went to his credit, and it is to be presumed that the defendant's counsel made the most of it in his argument before the jury. Besides, under the provisions of the 3666th section of the Code, the presiding Judge may exercise a sound discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against the weight of evidence, although there may appear to be some slight evidence in favor of the finding. If the Court below had been satisfied that the verdict in this case had been strongly and decidedly against the weight of the evidence, then it would have been his duty, under this section of the Code, to have granted a new trial, but he has refused to do so, and we find no error in that refusal.

Let the judgment of the Court below be affirmed.

CHELSEA MCCALLA, plaintiff in error, vs. GREEN B. MCCALLA, defendant in error.

1. When a suit was pending on a promissory note dated January 1st, 1860, for \$240 00, due one day after date, made by C. McCalla, with a memorandum on the back thereof as follows: "The within note to be paid when C. McCalla collects a certain note on Thomas Pledger for \$251 00." And it was in proof, by a witness, who was present

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when the note was made, that it, "the note, was given for a note the payee had on Pledger, which C. McCalla was to collect; when collected he was to pay the note sued on. The payee was to pay C. McCalla for his services. The memorandum was made at the same time as the note:

Held, That these facts were proper to be considered by the jury in determining what the parties meant by the note and memorandum, and that it was error in the Court to charge the jury that they could only consider it as it tended to show fraud or want of consideration.

2. If the facts show that it was the intent of the parties, by this note and memorandum, simply to make C. McCalla an agent to collect the Pledger note, then his liability would depend on whether he did collect it, and if not, whether he failed to use that diligence which it is the duty of a paid agent to use.

Contract. Evidence. Promissory notes. Principal and agent. Diligence. Before Judge McCUTCHEN. Whitfield Superior Court. October Term, 1872.

Green B. McCalla, as administrator upon the estate of Matthew McCalla, deceased, brought complaint against Chelsea McCalla upon two promissory notes, the first of which was dated January 1st, 1860, payable to McCalla one day after the date thereof, and for the sum of \$240 00, with the following indorsement thereon: "The within note to be paid when C. McCalla collects a certain note on Thomas Pledger for \$251." It is unnecessary to set forth the second note, as it was not involved in the decision of the Court.

The defendant pleaded that he was not indebted to the plaintiff on the note sued on, for it was given to the intestate in lieu of a note upon one Thomas Pledger for \$251 70, with the understanding that the payment thereof was to be dependent on the collection of the Pledger note; that never having made a collection on the last mentioned note, no liability has ever attached.

In the course of the trial, John B. Dunn, a witness for the defendant, testified as follows: "I was present when said note (the one sued on) was executed. It was given for a note Matthew McCalla had on one Thomas Pledger, which the defendant was to collect. When collected, he was to pay the

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note sued on. The old man was to pay him for his services; how much I do not now remember. I do not remember who put the indorsement on the back of the note; it was done by the direction of the old man at the time of the execution of the note."

In reference to this evidence the Court charged the jury as follows: "The parol testimony admitted can be considered by you only as it may tend to show a failure of consideration of the note sued on, or any fraud by Matthew McCalla in procuring the note to be given."

The jury returned a verdict for the plaintiff. The defendant moved for a new trial because of error in the aforesaid charge. The motion was overruled, and the defendant excepted.

D. A. WALKER, for plaintiff in error.

W. H. PAYNE; J. E. SHUMATE, for defendant.

McCAY, Judge.

1. We do not think the charge of the Court to the jury on the trial, restricting the view they might take of the parol evidence, was the full measure of the defendant's rights in this case. This note and the memorandum on the back of it were made at the same time, and coming as they both do from the possession of the plaintiff, they are part of the same written contract. The contract as it stands is dubious as to its real meaning. The note and the memorandum contradict each other in terms as to the time of payment, and the description of the Pledger note is very meagre. Even at common law the facts of a transaction and the surroundings of the parties might be used to explain a written contract which was not clear upon its face. Our Code, section 3748, goes further still, and allows all ambiguities, latent and patent, to be explained by parol; and I have always thought there was more propriety in explaining by parol patent ambiguities than latent. Patent ambiguities are notice upon their face to all

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that the instrument is uncertain, and everybody who deals with the matter has notice ; but latent ambiguities lie hidden beneath the surface, and one looking at the paper alone may be misled with the idea that all is clear. At any rate, our Code, as I understand it, breaks up the distinction. We think, therefore, the Court should have allowed the jury to consider this evidence so far as it went to explain what the parties meant by this note and memorandum. The jury, perhaps, would have concluded that, considering all the facts, the intent was simply to make C. McCalla an agent to collect the money on the Pledger note, and that this paper as it stands was the mode they took to secure to Matthew McCalla the faithful performance of his undertaking by Chelsea.

2. If this were the truth, then his liability would be complete when he got the money. If he failed to get it, then, as he was a paid agent, his liability would depend upon his diligence. We intend, however, to express no opinion on the effect of this evidence—that is for the jury, under a proper charge of the Court.

Judgment reversed.

WILLIAM BETHUNE, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. An indictment for burglary, charging the offense to have been committed in the night of a certain day, is sufficient, and it is not necessary to allege the hour when the burglary was committed.
2. Burglary may be committed in a house which is "the place of business of another, where valuable goods, wares or produce, or other articles of value are contained or stored." If it be not the "mansion or dwelling or store-house," it is sufficient if it be proven to be "the place of business of another, where valuable goods, etc., are contained or stored," although that "business" may not be of the kind which is carried on in conducting a "store-house."
3. It is not necessary, in order to sustain the charge of burglary, to prove the house broken into and entered was the "place of business," etc., used for the purpose of containing or storing the goods alleged to have been stolen. If the goods were, in fact, contained or stored in such a

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house at the time, it is sufficient to support the indictment, and this is also sufficient, although the business done in the house be not carried on with or in the articles or goods stolen.

4. The jury having, by their verdict, found that the defendant did commit the offense charged against him, and there being strong evidence to support the verdict, a new trial cannot be granted on the ground that the verdict is contrary to the evidence or the law.

Criminal law. Burglary. Indictment. New trial. Before Judge BUCHANAN. Coweta Superior Court. September Term, 1872.

William Bethune was placed on trial for the offense of burglary, under the following indictment:

"STATE OF GEORGIA—COWETA COUNTY:

"The grand jurors selected, chosen and sworn for the county aforesaid, to-wit: * * * In the name and behalf of the citizens of Georgia, charge and accuse William Bethune, of the county aforesaid, with the offense of burglary: for that, on the 11th day of July, in the year of our Lord, 1872, in the night of the same day, in said State and county, the said William Bethune, with force and arms, the wood-shop, a house of business of one certain Cash Stevenson, where valuable goods, wares, produce, and other articles of value were contained and stored, then and there situate, feloniously and burglariously, did break and enter, with intent, the goods and chattels in said wood-shop so as above described, then and there contained and stored, then and there feloniously and burglariously to steal, take and carry away, contrary to the laws of said State, the good order, peace and dignity thereof."

The defendant pleaded not guilty.

The evidence made the following case: Cash Stevenson did business in a wood-shop in the city of Newnan, in Coweta county. He kept his tools and lumber in this house. The shop was broken open and entered on the evening of the 11th of July, 1872. The shop was closed and the door locked on the evening before the burglary was committed. The house

was entered through the window, between sundown at night and seven o'clock the next morning. The window was closed on the evening before the offense was perpetrated. There were three sacks of wheat in the shop on the evening before, and on the next morning one was missing—a two bushel sack belonged to Mr. Dunbar. The defendant was lying about the shop on the evening before until four or five o'clock, when he left. The sack of wheat taken was worth fully two dollars. Mr. Dunbar's wheat, buggies and lumber were stored in the shop. At about eight o'clock on the evening of July 11th, 1872, J. A. Allen, one of the witnesses for the State, on his way from supper, discovered a sack of wheat lying on the sidewalk. There was no one about the wheat when he first saw it. Saw a man in his shirt-sleeves walking from the direction of it. It was too dark to tell who he was. When he returned home the sack of wheat was still there, and defendant was trying to get it on his shoulders. Allen assisted him in getting it up. Asked him what he was going to do with it? Replied, he was going to sell it! Saw that the sack was wet and muddy, and not knowing how much wheat there was, offered one dollar for it. Defendant accepted the bid, carried the wheat to Allen's store, received his money and went off. On the next day, the sack of wheat was identified as one of those that were in the shop on the evening before.

The evidence for the defense merely consisted of the statements of several witnesses as to defendant's being insane from the use of liquor, some swearing that he had *oinomania* and *delirium tremens*, others that he had been drunk for some time before the offense was committed.

The jury found the defendant guilty. Whereupon, a motion was made for a new trial upon the following grounds:

1st. Because the jury found contrary to the law and the evidence.

2d. Because the jury found against the weight of evidence.

3d. Because the Court erred in refusing to charge as requested by defendant's counsel, "That if they should believe from the evidence that defendant broke and entered in the

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night time with intent to commit a felony or larceny the house alleged in the indictment and proven on the trial, yet they could not find the prisoner guilty of burglary, unless they should believe it was a place of business of another of a similar nature and character to that of a mansion, or dwelling, or storehouse."

4th. Because the Court charged, "That they should convict the prisoner of burglary, if they should believe from the evidence that he broke and entered with an intent to commit a felony or larceny in any place of business of another, where valuable goods, wares, produce or other articles of value were contained or stored, and that it did not matter whether it was a storehouse, blacksmith shop or a wood shop."

5th. Because the Court charged the jury, "That it made no difference whether the place of business of another was used for the purpose of containing or storing valuable goods, wares, produce or other articles of value or not, if such articles were therein at the time of the breaking and entering."

6th. Because the Court erred in charging, "That it did not matter whether that place of business of another was a place in which a business was done in such valuable goods, wares, produce or other articles of value or not, if such articles were contained or stored there at the time of the breaking and entering."

7th. Because the Court erred in ruling, on motion of defendant's counsel to *quash*, that it was unnecessary to allege in an indictment for burglary in the night, the hour when the burglary was committed.

8th. Because the Court erred in overruling the motion of counsel in arrest of judgment, on the ground that the jury trying said case returned a verdict of guilty, the bill of indictment charging burglary, without specifying whether it was burglary in the day time or burglary in the night time.

The motion was overruled, and the defendant excepted upon each of the aforesaid grounds.

SMITH & BREWSTER; W. F. WRIGHT, for plaintiff in error.

A. H. Cox, Solicitor General, for the State.

McCAY, Judge.

1. The offense was charged to have been committed in the night of a certain day; and the objection is that the indictment does not specify the hour. The last clause of section 4320 of the Code, in defining burglary, says: "Burglary may be committed in the day or night;" and the next two sections prescribe the punishment for "burglary in the day time" and "burglary in the night." It may be remarked, that by the Act of October 5th, 1868, the penalty for burglary in the night has been changed to imprisonment in the penitentiary, in all cases. We cannot see any reason why the hour of the night in which the offense is charged to have been committed should be specified, which would not apply to setting out the hour of the day. The evidence must show in each case whether it was day or night, and when that was shown the hour would be immaterial. By the common law burglary could only be committed in the night, and "the common law now is, and for a long period has been, that those portions of the morning and evening in which, while the sun is below the horizon, sufficient of his light is above for the features of a man to be reasonably discerned, belong to the day. Light reflected from the moon is not to be taken into the account: 1 Bishop on Criminal Law, section 163. In England and in some of the United States, an hour has been fixed by statute for night, in law, to begin and close. But we have no such provision.

2. Burglary, by the Code, section 4320, is defined to be "the breaking and entering into the dwelling, mansion or store house or other place of business of another where valuable goods, wares, produce or any other articles of value are contained or stored, with intent to commit a felony or larceny." It is contended that if the house be not a dwelling, mansion or storehouse, it must be a place of business of another, where the business carried on is similar to that which appertains to

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a store house, or in the language of the objection, the other place of business must be "of the nature of a store house." This objection is founded on the rule that where particular words in a statute are followed by general words, the latter are restricted to like objects as those specified. In the definition given in the Code, of burglary, the words, "or other place of business of another," are further defined by the qualification "where valuable goods, wares, produce *or any other article* of value are contained or stored," and when the two terms of the sentence are put together just as they occur in the Code, the places where burglary may be committed, beside dwellings, mansions and store houses, are as distinctly specified as if they were expressly limited to those three. Indeed, those other places are more accurately described and have a more express definition by the terms of the law itself, than the word store house. The Code enlarges the number of places wherein the offense of burglary may be committed beyond that of the common law; and obviously intended the use of words, the ordinary signification of which was clear and commonly understood, to throw a strong protection around the place of business of the citizen where any article of value was contained or stored, by making any one who breaks and enters into them with intent to commit a felony or larceny, a burglar, and punishing him as such. In *Holland vs. The State*, 39 *Georgia*, 455, where the question was on the construction of an Act which said, it shall not be lawful for any person in this State to make any spirituous liquors "out of any corn, wheat, rye *or other grain*, except for medicinal purposes," etc., it was held that the seed of millet or sugar-cane was included in the words "other grain." In 40 *Georgia*, 689, the words of a penal statute were any E O, or A B C table, or Roulette table, *or other table of like character*," and were construed to embrace a table at which the game called "Keno" was played, and it was held that "the plain intent of the statute" required such a construction. Also in 3 *Georgia Reports*, 18, that a person who kept open a *tippling house* on the Sabbath, was guilty of a violation of the statute

which prohibited the keeping open *tippling houses* on that day. In 5 Wheaton Reports, 76, MARSHALL, Chief Justice, says: "That although penal laws are to be strictly construed, they are not to be construed so strictly as to defeat the obvious intention of the Legislature. The maxim is not to be applied so as to narrow the words of the statute to the *exclusion of cases* which those words, in their ordinary acceptation, or in that sense in which the Legislature has obviously used them, would comprehend. The intention of the Legislature is to be collected from the words they employ." We think the intention of the Legislature in this section of the Revised Code, which was taken from the Acts of 1866, is clear, that the words, "other place of business of another where valuable goods, wares, produce or any other article of value are contained or stored," are not restricted to mean simply a place of the nature of a storehouse.

3. The same rule of construction applies to the words "goods, wares, produce, etc." It does not matter what felony is intended, or of what the larceny is intended, if the breaking and entering be into a place wherein burglary may be committed. A person may break and enter into a storehouse or other place, etc., where wheat is contained or stored, with intent to commit rape or murder, or to steal money or whatever of value may be therein and be guilty of burglary. If "the place" answer the description of the law, the felony or larceny intended may be as various as the statutes defining acts of felony or larceny. It is the intent to steal, so far as the *larceny* is concerned, and not *the kind* of "article of value" which is stolen or intended to be stolen that makes the offense complete.

4. There was strong evidence to support the verdict, and we do not feel authorized to grant a new trial on the ground that the verdict was contrary to law or the evidence.

Judgment affirmed.

Rosser vs. Harris.

JOEL C. ROSSER, plaintiff in error, vs. PETER C. HARRIS,
defendant in error.

Where a parol contract was made in November, 1865, for the rent of a plantation for the year 1866, and the defendant went into possession of the place, in pursuance of the contract, and cultivated it for the year 1866, this is such a part performance of the contract as will take it without the operation of the statute of frauds. (R.)

. Statute of frauds. Landlord and tenant. Before Judge HARVEY. Polk Superior Court. August Term, 1872.

For the facts of this case, see the decision.

WOFFORD & COX; THOMAS W. DODD; J. W. H. UNDERWOOD, for plaintiff in error.

No appearance for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant to recover the one-sixth part of the rent of a plantation in Alabama, which the plaintiff alleged the defendant had received for the year 1866, the plaintiff and defendant being the heirs, with others, of Andrew F. Woolly, deceased. The plantation, for which it is alleged the defendant received the rent for 1866, was the property of Woolly at the time of his death, in December, 1865. The plaintiff testified, at the trial, that the defendant had received the rents of the plantation for 1866, and had kept the same, and proved the value thereof, and also stated that he had paid his *pro rata* share of the taxes on the land for that year. The defendant proved by two or three of the other parties interested in the land as the heirs of Woolly, that in October or November, 1865, Woolly, before his death, made a contract with the defendant that if he would pay the tax on the land for the year 1866, he should have all the rents and profits of the land for that year. The defendant testified, that he instructed his agent in Alabama, Breedlove, to pay the taxes on the plantation for him for the

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year 1866, and he had him charged with \$100 00 as taxes paid on it for that year. A. F. Woolly, Jr., the son of the decedent, testified, that he did not know that the defendant had paid the taxes, as he had agreed to do, and he paid them for 1866, took a receipt and charged the same to the plaintiff and the other heirs ; supposed he was paying them for defendant, under his agreement with A. F. Woolly, deceased. The jury, under the charge of the Court, found a verdict for the defendant. The plaintiff made a motion for a new trial, on the grounds specified therein, which was overruled, and the plaintiff excepted.

If this parol contract for the rent of the plantation, made in November, 1865, for the year 1866 is within the statute of frauds, still, there was such a part performance of it as will take it out of the operation of the statute. The defendant went into the possession of the plantation, under the contract, and cultivated it, either by himself or tenants, for the year 1866, in pursuance of the contract made with the deceased. He could not have repudiated it at the end of the year had he been in life, and his heirs-at-law, who acquiesced in the defendant's possession of the plantation, under that contract, during the year 1866, cannot do so ; they are bound by the contract of their ancestor. If the plaintiff has paid his *pro rata* share of the taxes to A. F. Woolly, Jr., which the defendant was bound to pay for the rent of the plantation, he can recover that amount from the party to whom he paid it. If A. F. Woolly, Jr., paid the taxes for the defendant, as he states he supposed he was doing, he had no legal right to charge any part thereof to the plaintiff. The defendant was bound to pay the taxes on the land for 1866, under his contract, and if the heirs have paid it, they can compel him, by suit, to pay them, but cannot repudiate the contract and compel him to pay the proven value of the rent of the land, under the facts of this case, on the ground that the contract was void by the statute of frauds. The plain object of the plaintiff in repudiating the contract made between the defendant and old man Woolly, the deceased, is to enable him, as one of his

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heirs, to recover from the defendant his share of the value of the rents and profits of the plantation for the year 1866, in opposition to the wishes of the other heirs, but we cannot gratify him, under the evidence contained in the record.

Let the judgment of the Court below be affirmed.

SELMA, ROME AND DALTON RAILROAD COMPANY, plaintiff
in error, *vs.* J. B. FLEMING, defendant in error.

1. When there was a trial of a suit for damages for killing the plaintiff's cow against a railroad company, and the declaration claimed as a part the damages, expenses of litigation under section 2801 of Irwin's Revised Code :

Held, That it was not error in the Court to permit the plaintiff to prove "that he offered to compromise, that they refused and offered to pay him \$30 00. He refused to take \$50 00, but was willing to settle without suit."

2. In an action against a railroad company for killing a cow of the plaintiff by the running of its cars it was not error in the Court to refuse to charge as requested: "If plaintiff's cow fell down a bank and rolled under the train after the engine passed her, or if the cow jumped on the track fifteen feet in front of the engine, then the accident was unavoidable and the company is not liable." Whether the company was negligent or not it was for the jury to find, and it was not the duty of the Court to decide whether or not, under such circumstances, there was negligence.

3. The verdict is not illegal as contrary to the evidence.

Railroads. Damages. Evidence. New trial. Compromise. Before Judge HARVEY. Floyd Superior Court. January Adjourned Term, 1872.



Fleming brought suit against the Selma, Rome and Dalton Railroad Company for damages sustained by him, resulting from the killing of his cow by the defendant. The defendant pleaded not guilty. The expenses of litigation were claimed by the plaintiff as a part of the damages. The jury returned a verdict for the plaintiff for \$60 00 and costs. The defendant moved for a new trial upon the following grounds, to-wit:

1st. Because the verdict is contrary to the evidence and the law.

2d. Because the Court erred in refusing to exclude the testimony of the plaintiff on the subject of the offer of compromise made by defendant, as follows: "They offered to pay me \$30,00, and I refused. I refused to take \$50,00, but was willing to settle without a law suit."

3d. Because the Court erred in refusing to charge the jury as follows: "If the plaintiff's cow fell down a bank and rolled under the train after the engine passed her, or if the cow jumped on the track fifteen feet in front of the engine, then the accident was unavoidable, and the railroad company is not liable."

The motion was overruled, and the defendant excepted upon each of the grounds aforesaid.

PRINTUP & FOCHE, for plaintiff in error.

W. D. ELAM, by T. W. ALEXANDER, for defendant.

McCAY, Judge.

1. Under section 2891, Irwin's Revised Code, damages for a *tort* may be increased by the expenses of litigation, if the defendant have shown himself specially litigious in the matter. This declaration claimed such an increase on the ground of such litigiousness. The evidence offered was *some* evidence going to show it. Plaintiff offered to compromise—defendant refused—offered \$30 00, etc. The evidence is very weak, it is true. It goes to prove it, and that is all; and had the jury, by their verdict, found any such expenses, we should hesitate to sustain it. But, under the proof, if they found for the plaintiff at all, their verdict is not more than it ought to be. The cow was proven by two witnesses to be worth more than the verdict, and there is no contradiction of these witnesses.

2. What constitutes negligence is eminently a question for the jury. For the Court to pronounce an accident "unavoidable," would be an usurpation of power. In the very nature

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of things, it must be a question of fact, whether, under a given set of circumstances, the accident was unavoidable. In this very case, is the Court authorized to say that an engine cannot be stopped instantly? Is not that a fact for the jury? What is negligence and what is prudence, the law only defines by referring to the conduct of prudent men. How prudent men act is referred to the jury, who are presumed, by their habits of life, to have informed themselves upon the subject. We think, therefore, that the Judge was right in refusing to say to the jury that this or that state of facts would make the accident unavoidable. He might define the meaning of the word, but to say as was asked would be beyond his sphere. Nor do we think this verdict so contrary to the testimony as to be illegal. We are not prepared to say that the company and its agents were perfectly free from fault. Was it prudent to run at that speed, at that place? Has an engine driver the right to rush on, seeing cattle by the road side, and knowing, as he does, that often, in their fright at his huge machine, they will rush right before it? Has anybody a right, even on his own land, to do a dangerous thing, unless he incloses that land against animals authorized by law to roam at large?

3. We think there is enough testimony to justify this verdict, and it was for the jury to say which of the witnesses it believed.

Judgment affirmed.

SOUTHWESTERN RAILROAD COMPANY, plaintiff in error, *vs.*
JAMES R. KNOTT & COMPANY, defendants in error.

1. If the supervisor of a railroad, who has authority to purchase cross-ties for his principal, contracts with a party for their purchase, stating to the seller that his principal wants them to lend to another railroad to which it had promised them, and the cross-ties are furnished and put on the cars of the road whose agent has thus contracted for them, such road is liable for their payment, notwithstanding the statement as to the purpose for which they were purchased be not true, and the real

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fact was that the supervisor was the agent of another party in making the purchase. The seller is not affected by the truth or falsehood of the statement.

2. The questions in this case were properly submitted to the jury, and the evidence sustains the verdict.

New trial. Principal and agent. Before Judge HARRELL. Terrell Superior Court. May Term, 1872.

James R. Knott & Company brought complaint against the Southwestern Railroad Company, upon an account for cross-ties furnished, amounting to \$743 75, with interest from February 25th, 1871. The defendant pleaded the general issue.

The following testimony, in substance, was introduced for the plaintiff:

John A. Bishop testified as follows: Mr. Walden came to see witness about purchasing some cross-ties which plaintiffs had on hand; told him to see Mr. Russell, one of the plaintiffs; witness heard a part of the conversation between Mr. Walden and Mr. Russell, and his understanding was, that they were to go to Dawson and see Mr. Knott, and if he agreed to take the offer of twenty-five cents a piece for the cross-ties, it would be a trade. A short time after this a train came for the ties and they were delivered. Walden stated to witness as a reason why he wanted the ties, that Mr. Powers, the superintendent of defendant, had lent some ties to a railroad in Alabama, and that defendant did not have ties on its road to spare, hence defendant wished to purchase these to supply their place. He said that the ties would be paid for by the pay train of defendant when it came down in February. The contract was made in January. Mr. Walden was the supervisor of defendant and made contracts for cross-ties and other material. Witness and Russell made the sale to Mr. Walden, subject to Knott's approval. The ties sold were sawed. Witness had been depot agent for defendant and knew it did not use sawed ties, except at switches. Walden did not say that he was buying the ties for defendant, but witness inferred this to be the fact as Walden was the agent

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and supervisor of defendant. When witness said that the ties were delivered to defendant, he meant that they were taken of by its cars. Did not hear Vischer's name mentioned until the March after the ties were sold. Walden excused himself for not paying for the ties in February, by saying that Phelps had not returned them soon enough for the February estimate. His excuse for not paying in March was that Vischer had failed to send the money.

Thomas A. Russell testified substantially as did Bishop, stating the following additional facts: Went to Dawson to see Mr. Knott; he approved the trade. Knew that defendant did not use sawed ties except at switches; knew that Walden was not buying the ties for the use of defendant but for a road in Alabama; thought that the defendant would pay for them; sent the bill for the ties to Walden, at Fort Valley, by the conductor; Did not usually send bills against the defendant to the office in Macon for payment; always sent them by the conductor or gave them to an agent of the company. Delivered the ties to the defendant and looked to it for payment; would not have sold the ties to Mr. Vischer or to any railroad in Alabama, except for cash; had refused to let railroads in Alabama have them because they would not pay the money.

The defendant introduced the following testimony:

W. S. Walden testified as follows: Witness made the contract with the plaintiffs for the cross-ties. Mr. Vischer, a contractor for a railroad in Alabama, authorized witness to purchase the ties for him. The ties were shipped over defendant's road as any other freight, and were delivered to Vischer & Company, at Opelika, Alabama. Witness is supervisor of defendant's road and makes contracts for defendant all along its line. The ties sued for were purchased for Vischer & Company, and not for defendant; thought he so stated to plaintiffs at the time of the purchase; told plaintiffs that Vischer would send the money for the ties when the next pay train came down. The money was to have been paid in Feb-

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ruary, between the 15th and 25th; is certain that he told plaintiffs that he was buying the ties for Vischer & Company.

..... Vischer testified as follows: The ties were purchased by Walden, as agent for Vischer & Company; lives near Fort Valley, Georgia, and has resided there for the last twenty years.

The jury returned a verdict for the plaintiffs for the principal and interest of the account sued on. Whereupon the defendant moved for a new trial upon the following grounds, to-wit:

1st. Because the verdict of the jury is contrary to the law and the evidence.

2d. Because the jury found contrary to the following charge of the Court, to-wit:

“An agent can only bind his principal when acting within the scope of his agency. The agent must act within the authority granted to him, reasonably interpreted. If the agent exceeds his instructions, he does so at his own risk, the principal having the privilege of affirming or dissenting, as his interest may dictate. If you believe from the evidence that Mr. Walden was the agent or supervisor of the defendant, then he was authorized to buy ties or material for the use of defendant, but he was not authorized as its agent to make a purchase for another company, or for any other person, unless there was express authority from the defendant to do so, and the Court charges you that the *onus* is on the plaintiffs, who seek to charge the defendant, to show that he had such authority. A person may be the agent of two parties at the same time. If you believe that Mr. Walden was, at the time he made this contract, acting as the agent of the defendant, that he bought them for the defendant, and the defendant received the ties, then it is liable. But if he was not acting for the defendant, and by its authority, at the time and in the transaction in controversy, and was acting as the agent of another person, Vischer & Company, then Vischer & Company are the parties who made the contract. They are liable to the plaintiffs and not the defendant. You will look into the evi-

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dence and decide this case according to the evidence, under the rules of law which the Court has given to you."

The motion was overruled, and defendant excepted upon each of the aforesaid grounds.

W. K. DEGRAFFENREID; LYON & IRVIN, for plaintiff in error.

HOYLE & SIMMONS; C. B. WOOTEN, for defendants.

TRIPPE, Judge.

1. The main question in this case is, did Walden, as agent for the Southwestern Railroad, purchase the cross-ties? It is contended that he bought them as agent of Vischer & Company. If he informed Knott & Company of this, of course the railroad is not liable. The testimony on this point is conflicting. Walden states that he notified Knott & Company that he was buying as agent for Vischer & Company. Russell and Bishop testify to the contrary, that Vischer's name was not mentioned until after failure to pay. Walden was supervisor of the railroad, whose business it was to purchase cross-ties, and he was in the habit of so purchasing. It is further contended that if Walden stated to the owners of the cross-ties that they were wanted by the road to be loaned to a road in Alabama, and it was not true, the Southwestern Railroad Company was not responsible. We do not suppose one who deals with an agent who has authority from his principal to make the purchases he may be negotiating for, is affected by the truth or falsehood of the agent's statement as to the use his principal intends to make of the articles purchased. The test is, was he the agent to make such purchases? In this case was Walden, the supervisor, the general agent of the road in purchasing cross-ties? There is no doubt of this from the testimony. In fact it is not disputed. The seller was not bound to see to what use the cross-ties so purchased were applied. And if, in such a case, such a general agent were really buying for a third party, without disclosing it, and in-

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duced the seller to part with his goods, as if they were bought for a principal known to be such, that principal is bound. The principal is bound for the fidelity of his agent.

2. The jury found in accordance with the testimony introduced by defendants in error. In addition to what has been stated, one of the plaintiffs testified he would not have sold the cross-ties to Vischer & Company, and that the contract with Walden was that the next month after the sale they were to be paid by the pay agent of the railroad, on the coming down of the next pay train. We do not think the verdict was unsupported by evidence, and the Judge trying the case refused to disturb it.

Judgment affirmed.

GUSTAVUS W. NAGLE, administrator, plaintiff in error, vs.
JOSEPH H. LUMPKIN, sheriff, defendant in error.

Two attachments were placed in the hands of a sheriff and levies made, and whilst the property was in the possession of the sheriff the defendant gave replevy bonds, the security justifying, and stated in the answer of the sheriff, to have been at the time a citizen of the State of Georgia, and no exception was taken to the bonds at the return term of the attachments; at the trial term, judgments were rendered against the principal and security, and executions placed in the hands of the sheriff, who made returns of *nulla bona*; the plaintiff petitioned the Court for a rule against the sheriff, who set up the above stated facts in his answer, and also that he had acted in good faith; the answer was not traversed. The Court did not commit error in refusing to make the rule absolute. (R.)

Rule against sheriff. Before Judge HARVEY. Floyd Superior Court. January Adjourned Term, 1872.

For the facts of this case, see the decision.

ALEXANDER & WRIGHT, for plaintiff in error.

PRINTUP & FOCHE; UNDERWOOD & ROWELL, for defendant.

WARNER, Chief Justice.

The plaintiff petitioned the Court for a rule against the sheriff, calling upon him to show cause why he should not pay the money due on certain *fi. fas.* which had been placed in his hands for collection. It appears from the facts disclosed in the record, that the plaintiff sued out two attachments against the property of the defendant, who was a non-resident of the State. The attachments were levied on the property of the defendant, as appears by the answer of the sheriff, which was pointed out by the plaintiff's attorney. After the attachments had been levied, and whilst the property was in possession of the sheriff, the defendant offered to replevy the same by giving bonds and security for the payment of the plaintiff's judgments and costs, as provided by section 3243 of the Code. At first the sheriff declined to take the bonds, but the security, who, the sheriff states, was a citizen of the State, having made oath that he was solvent and worth the amount of the bonds required, the sheriff then took the bonds and turned over the property to the defendant, and in doing so acted in good faith. The plaintiff took no exception to the bonds at the return term of the attachments, but at the trial term thereof took judgments against the principal and security for the amount of his debts; *fi. fas.* were issued thereon, placed in the sheriff's hands, who made a return thereon that he had made frequent search for property on which to levy, but had not been able to find anything in this county on which to levy. The plaintiff did not traverse the sheriff's return. The Court, upon the foregoing statement of facts, refused to make the rule absolute against the sheriff for the payment of the money due the plaintiff, whereupon he excepted.

The plaintiff had his option of one of two remedies against the sheriff, if he was injured by his neglect of duty in failing to execute the process of the Court placed in his hands. First, by an action on the case against him, or to proceed against him by an attachment for contempt of Court. The

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plaintiff elected to pursue the latter remedy. In our judgment, there was no error in the judgment of the Court below, in refusing to hold that the sheriff was liable to be attached for contempt of Court, and in refusing to make the rule absolute against him for the payment of the plaintiff's debt, on the statement of facts disclosed in the record.

Let the judgment of the Court below be affirmed.

HAYWOOD BROOKINS, Ordinary, plaintiff in error, vs. THE CENTRAL RAILROAD AND BANKING COMPANY, defendant in error.

When, without authority of law, a railroad company, thirty years ago, changed the public road at one of its crossings, cut out a new road, and, at some expense, built a bridge over a stream said new road crossed; and, by common consent, the old road was abandoned and the new one used by the public:

Held, That the railroad company, in the absence of any contract so to do, is not bound to keep up said bridge, and the mere fact that the company first built it, and that it has since, at various times, repaired it, (it being near one of its depots,) does not make an implied contract with the county that the company will keep it in repair.

Railroads. Roads. Before Judge TWIGGS. Washington Superior Court. March Term, 1872.

Haywood Brookins, as Ordinary of the county of Washington, brought case against the Central Railroad and Banking Company for \$1,000 00 damages, alleged to have been sustained by plaintiff, by reason of the failure of defendant to repair and keep up a certain embankment on Hill creek, and bridges over said stream, on a "common road" of said county, known as the "Darien road."

The defendant pleaded the general issue.

The evidence made the following case: When, in the course of the construction of the Central Railroad, the work had approached station number fourteen, the company laid out the new

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road through the land of one William Fish, and paid him \$100 for his services. This occurred about the year 1845. William M. Wadley, the contractor in charge, moved near to station fourteen, and for his own convenience, and at his own expense, worked the road, built the bridges, and kept them in repair until he moved away, in 1857. The course of the old Darien road was more beneficial to the defendant than the new road, for the reason that the old road ran under the railroad track, while the new road ran over it. The new road passes by the station, and the change was made for this purpose. The old road is not closed, but is still passable for all vehicles except those which are high-topped. The defendant has offered, and is still willing to provide a good, substantial crossing at the old point of intersection. The evidence was conflicting as to whether the defendant had repaired and kept up, at any time, the bridges over Hill creek. In October, 1869, the citizens residing in the vicinity of the station made complaint that the bridges had decayed, and were in an impassable condition. Plaintiff notified the defendant and requested it to have them rebuilt. Upon the refusal of the defendant, the plaintiff rebuilt them, at an expense of \$524 00.

The jury returned a verdict in favor of the defendant. The plaintiff moved for a new trial upon the following grounds, to-wit:

1st. Because the verdict was contrary to the evidence.

2d. Because the Court refused to charge the jury as follows: "That he who derives the advantage must take the burden. If, therefore, the jury believe that the Central Railroad cut the new road for its own advantage, and thereby rendered the erection of bridges necessary, and by long custom kept said bridges in repair, and the county recognized said road as a public road, and said railroad obstructed a public road, and changed said road, then there is an implied contract to keep up the bridges on the new road."

3d. Because the Court erred in the following charge: "That the road was either a public or a private road. If a public road, it must be made in the manner pointed out by the stat-

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ute. That if this action is for damages done to a public road, and that it does not pursue the remedy pointed out by the statute, the plaintiff is not entitled to recover. If it is a private road, and not made in pursuance of the section of the Code, the Ordinary has no right to appropriate money for the repair of bridges on a private road, and the plaintiff cannot recover in this form of action."

The motion was overruled, and the plaintiff excepted upon each of the grounds aforesaid.

LANGMADE & EVANS, by SAMUEL F. WEBB, for plaintiff in error.

JACKSON, LAWTON & BASINGER; R. L. WORTHEN, for defendant.

McCAY, Judge.

We do not think the charge of the Court in this case was the proper charge to be given, as we are strongly impressed with the idea that this road, used and worked as it has been, for over twenty years, is a public road, even though there be no proof, in fact, of an order, etc., of the Inferior Court. But we are clear that there is nothing in this evidence to have authorized a verdict for the plaintiff.

The road is not within the limits of a crossing, so as to make it the duty of the Company to keep it up as part of the crossing. It is from two to three hundred *yards* from the track. Is there anything more here than the ordinary case of a planter turning the public road without authority of law? Suppose he does this, cuts out a good road, builds a causeway or a small bridge, puts the whole in good order, and opens it to public use. It is adopted, the old road deserted, and finally closed up, and the new one used for thirty years; suppose, even, to make the case stronger, that the planter, for his own convenience, has, at times, repaired the bridge or causeway, or filled up holes in the road. Can it for a moment be pretended that under this state of facts the law would cast upon the

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planter the permanent duty of keeping up the bridge or causeway?

There are always two parties to a contract. Is it not just as fair to say that the public, when it accepts a new road, takes it as it is, as to say that he who has opened it has contracted to keep it in order? Nay, is it not far fairer and more reasonable to say (in the absence of any contract) that the new road goes into the hands of the public, just as the old one—that if the public accepts it—it takes upon itself the ordinary duty attaching to it with respect to public roads?

We see nothing in any of this evidence to justify the claim of the Ordinary. The railroad company has the same rights as to a road as any citizen, and if, for the convenience of those wishing to get to its depot, it repairs a road or a bridge, it does it as any other citizen might do, without incurring the liability of undertaking always to do it. We think the verdict right. There was no evidence to sustain the plaintiff's claim.

Judgment affirmed.

ARMSTED B. HILL, executor, plaintiff in error, *vs.* ELIZABETH M. CLARK *et al.*, defendants in error.

A testator directs his executor "to pay an annual sum of \$500 00 to his wife, out of the net income of his estate, in semi-annual installments." In another item of his will he refers to this bequest as an "annuity devised to his wife." Nothing else in the will defines or limits the term of years during which it is to be paid.

In four several items of his will he further gives, after deducting the foregoing annuity, one-fourth of the annual income arising from his estate to four several sets of legatees. For three of said shares in the income trustees are appointed. The fourth share is to be paid on certain conditions, with a remainder created therein. No time is appointed for the distribution of the estate, or the payment of any share thereof, except as to the income.

The widow applied for dower in the land and the same was assigned to her. Subsequently she executed an agreement with the legatees whereby she relinquished her dower "to the estate and legatees," on

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condition that the legatees paid her *during her life* the annuity given her by the will, and agreeing that the estate might be distributed, but the relinquishment to be void if the Courts would not decree a distribution. This the legatees and the trustees appointed in the will agreed in writing to do. The executor was one of the trustees. The beneficiaries of the trusts are *femes covert*, and their children born and to be born.

The executor filed a bill in chancery alleging the foregoing facts, further stating that the conditions on which the fourth share in the annual income was to be paid had happened, and asked the direction of the Chancellor as to the execution of the will, that the property might be divided and turned over to the legatees and trustees "on the same basis, terms, conditions and limitations as the annual income had been given," etc., and that the right of the widow to the annuity might be secured by a proper decree. To this bill the widow, the trustees, etc., were parties, and their answers admitted the facts as stated and joined with the executor in asking the decree prayed for.

On the hearing, the Court, after the reading of the bill and answers, dismissed the bill for want of equity.

Held, That the rights of the annuitant, under the agreement, and the liabilities of the respective shares for its payment, the condition attached to the relinquishment of dower, and the beneficiaries of said relinquishment and of the estate being mostly *femes covert* and children born and to be born, and who take the estate through trustees, make this a proper case for invoking the aid and direction of a Court of equity, in order that the rights of all parties may be finally adjudicated, and all doubt as to the proper construction of the will, and as to the time when the distribution of the estate can be made, may be removed, this Court holding that the gift or bequest of the income carries with it the *corpus*, under the limitations provided in the will.

Will. Equity. Before Judge BUCHANAN. Coweta Superior Court. September Term, 1872.

Armsted B. Hill, as executor of the last will of Major B. Clark, deceased, filed his bill against the legatees under said will, making the following case: Testator bequeathed to his wife, Elizabeth M. Clark, a special legacy of a horse and rock-away, and an annuity of \$500 00, to be paid annually by complainant as executor, out of the net annual income of said estate. The widow applied for and had her dower in said estate set apart. Testator bequeathed one-fourth of the net annual income of said estate to complainant, as trustee, for the sole and separate use of his (complainant's) wife, Mary C. Hill, and her chil-

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dren, and one-fourth of the net annual income to his son, Joseph W. Clark, as trustee for the sole and separate use of his wife, Elizabeth Clark, and his children, and one-fourth of the net annual income to Nathaniel Glover, as trustee for the sole and separate use of his wife and her children, complainant's wife, and Frances C. Glover, Nathaniel Glover's wife, being the daughters of testator. Testator further bequeathed one-fourth of the net annual income to his son, Benjamin M. Clark, "subject to the following conditions, to-wit: My executor will retain (from year to year, as he may think proper,) with the *corpus* of my estate, so much of the annual share of said Benjamin M. Clark as will make the sum of \$500 00, (this sum is the same I have heretofore advanced the said Benjamin.) After the said sum of \$500 00 has been settled in the manner aforesaid against the said Benjamin, my executor is hereby directed to pay annually to him the sum of \$150 00, retaining in his hands, without interest, the remainder of the annual income bequeathed to the said Benjamin M., until he, the said Benjamin M., marries, or abandons an idle life and becomes settled in a useful and lawful occupation, or reaches the age of thirty years; in either event, my executor is directed and required to pay to him at once the amount retained from his one-fourth share in the net annual income of my estate, and afterwards he is to receive equally of this item. Now, should the said Benjamin M. marry, and leave a wife and no heirs of his own body begotten, it is my will that two-thirds of his interest in my estate revert to the *corpus* of my estate, and in that event such widow as he may leave must draw only one-third of the interest bequeathed to the said Benjamin M." Two of the aforesaid contingencies have transpired, to-wit: the said Benjamin has reformed and become steady in habits, and has intermarried with a wife, and is and has been receiving the full amount of the said one-fourth net annual income of said estate in strict compliance with the provisions of said will. Complainant has paid to the trustees the full amounts of the one-fourth of the net annual income of said estate regularly and annually. To keep

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together and to manage the property of said estate, which is mostly in lands, is very laborious and troublesome to complainant and of great expense to the estate. All the trustees and the said Benjamin M. Clark are prudent and discreet men, well calculated to manage and control the property bequeathed to them as trustees. It would be greatly to the interest of the legatees under said will to divide the *corpus* equally between them on the same terms and conditions as the net annual income was directed by the testator to be divided and distributed. Complainant expressly charges that the true meaning and intention of testator was, that upon the happening of either one of the contingencies set forth in the bequest to said Benjamin M. Clark, the *corpus* was to be distributed among the legatees on the same terms and conditions, and the same restrictions and limitations as he imposed upon and directed to be observed in reference to the net annual income. Testator's widow has recently signed a relinquishment of dower in the lands of said estate, "in consideration of the obligation or promise in writing, this day made by the legatees of said estate, to pay to said Elizabeth M. Clark the annuity of \$500 00 mentioned and devised to her by said will periodically, to-wit: annually the remainder of her natural life, and for the further consideration that said estate may be distributed amongst the legatees thereof; provided, nevertheless, that if the Courts of said State refuse to decree a distribution of the property of said estate, then, in that event, the aforesaid relinquishment of said dower is hereby revoked."

Complainant prays that defendants may be compelled to discover as to the charges contained in his bill; that he may be relieved from the further management of the estate; that the Court will pass such order and decree as will direct him in executing the trust reposed in him by testator, in carrying out the true intent and meaning of said will; that the writ of subpoena may issue.

The defendants filed a joint answer, admitting the allegations of the bill, joining in the prayer for a division therein contained, and further praying that the annuity of \$500 00

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to testator's widow for her natural life, be secured to her by the decree of the Court.

When counsel for complainant had concluded the reading of the bill and answer to the jury, the Court, on its own motion, dismissed the bill for want of equity, to which judgment the complainant excepted, and now assigns the same as error.

LUCIUS H. FEATHERSTON, for plaintiff in error.

SAMUEL FREEMAN, for defendants.

TRIPPE, Judge.

The will of the testator, Clark, directed his executor "to pay an annual sum of \$500 00 to his wife, out of the net income of his estate, in semi-annual installments." The balance of the income is to be paid to four several sets of legatees, with trustees for three of those shares. The fourth share is payable on conditions which have now happened, with a remainder created therein. The widow had applied for dower, which has been assigned. She afterwards executed an agreement with the legatees, relinquishing her dower to the estate and to the legatees, on condition that the legatees paid her, during life, the annuity, the relinquishment to be void if the Courts would not decree a distribution, which she consented might be done. The legatees, trustees and executor (he being one of the trustees,) agreed to this in writing, and the bill is filed to carry out this, and for a distribution. The beneficiaries of the trusts are *femes covert*, and their children—born and to be born.

We think the gift of the income carried with it the *corpus*, under the limitations provided in the will: Code, section 2419. We are also of opinion that the rights of the annuitant, under the agreement, as well as the will, and the liabilities of the respective shares for its payment, the conditions attached to the relinquishment of dower, and the beneficiaries of said relinquishment and of the estate being mostly *femes covert* and children, represented by trustees, make this a proper case for

invoking the aid of a Court of equity, in order that the rights of all parties may be finally adjudicated, and all doubt as to the proper construction of the will, and as to the time when a distribution can be made may be removed, and, at the same time, decreeing such a distribution of the estate as the parties are entitled to, under the will and the agreement.

It may be added that all the parties in interest join the executor in asking for such a decree and such a distribution. There being minors and *femes covert* as *cestui que trusts*, adds to the reasons why such an application may be sustained.

Judgment reversed.

ROBERT E. CUNNINGHAM, plaintiff in error, vs. FRANKLIN, READ & COMPANY, defendants in error.

1. Where warehousemen are sued for damages incurred from the loss of cotton in weight, it is incumbent upon the plaintiff to show that such loss accrued from the negligence and want of proper care on the part of the defendants. (R.)
2. A decision awarding a new trial will not be interfered with, unless the discretion of the Court below has been abused. (R.)

Warehousemen. Diligence. New trial. Before Judge GOULD. City Court of Augusta. May Term, 1872.

For the facts of this case, see the decision.

SAMUEL F. WEBB; W. W. WILCOX, for plaintiff in error.

J. E. HARPER & BROTHER, for defendants.

WARNER, Chief Justice.

The plaintiff brought his action against the defendants, as warehousemen, to recover damages for the negligent manner in which they performed their duty in taking care of sixty-five bales of cotton stored with them by him, in their warehouse, by reason whereof the plaintiff alleges the cotton lost in weight one thousand and twenty-nine pounds. On the

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trial of the case, the jury, under the charge of the Court, found a verdict in favor of the plaintiff, for the sum of \$70 42, with interest. A motion was made for a new trial, on the several grounds stated therein, which was granted by the Court, and the plaintiff excepted. The defendants also excepted to the ruling of the Court, and both bills of exceptions were argued together.

A warehouseman, by the law, is a depositary for hire, and is bound only for ordinary diligence. If the defendants exercised that ordinary diligence in taking care of the plaintiff's cotton stored with them, which a prudent man would have exercised in protecting and taking care of his property, and the cotton lost in weight, without their fault or negligence, they are not liable for such loss, and it was incumbent on the plaintiff to prove that the loss of the weight of the cotton was the result of their negligence and want of care in the proper management of it. It is not sufficient for the plaintiff to prove that the cotton stored with the defendants lost in weight, but he must go further and prove that the loss resulted from the negligence and want of proper care on the part of the defendants, as warehousemen. If it had been shown that the defendants, by the want of proper care and diligence as warehousemen, had exposed the plaintiff's cotton stored with them to alternate rain and sunshine, and by reason thereof, the cotton had lost more in weight than it would naturally have done if kept dry, or if any other act of negligence on their part had been shown from which the loss in the weight of the cotton had resulted, then the defendants would have been liable, but nothing of that kind was proved on the trial. We find no error in the charge of the Court to the jury or in granting the new trial in view of the evidence disclosed in the record. The exercise of the discretion of the Court below, vested in it by law, in granting the new trial, has not been abused in this case, so as to authorize this Court to interfere and control it.

Let the judgment of the Court below, in both cases, be affirmed.

Breed vs. Mitchell.

ABEL D. BREED, lessee, plaintiff in error, vs. RICHARD V. MITCHELL, defendant in error.

1. A non-resident of this State, who is the lessee of a railroad in this State, and therefore liable to be sued as was the railroad company, is none the less liable to be proceeded against by attachment as other non-residents are.
2. Where goods arrive at their point of destination and the packages or casks are, by the fault of the carrier, in a damaged condition, so that they cannot be handled without loss and further damage, it is the duty of the carrier to repair the casks, if possible, before the owner can be compelled to receive them, and if he refuse to do this the owner may refuse to receive the goods and may recover the value, and this without offering to pay the freights, since the carrier has not completed his undertaking.
8. Goods are *prima facie* presumed to have been received by a carrier in good order for shipment, and if they were not so, it is for the carrier to show it.

Attachment. Railroads. Carriers. Presumption. Before Judge HARVEY. Floyd Superior Court. January Adjourned Term, 1872.

Mitchell sued out an attachment against Breed, as lessee of the Selma, Rome and Dalton Railroad Company, returnable to the nine hundred and nineteenth district, for the sum of \$66 54. The defendant traversed the ground of attachment, claiming that Breed, as lessee, resided within the State of Georgia, and as such, was suable in the same manner as said railroad company could have been sued, had it not been in Breed's hands, as lessee. The defendant pleaded the general issue, and that said claim was based upon a failure of defendant to deliver six barrels of oil, and such failure was due to the fact that plaintiff had not paid the freight thereon.

The magistrate rendered judgment against the defendant. Whereupon the case was carried by appeal to the Superior Court. Upon the trial in this last tribunal, the evidence made the following case:

Plaintiff bought six barrels of oil in Baltimore. They were conveyed by the defendant to Rome. Upon their arrival four

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barrels were in good order, but two were leaking. Plaintiff was willing to take the four barrels; the agent of defendant would not allow this, but insisted upon his receiving all. The agent stated that the defendant would be responsible for all the damages which had accrued up to the time of delivery, but would not settle for the leakage between the depot and plaintiff's store. The agent refused to put the two damaged barrels in good order. Plaintiff was willing to receive the oil if the agent would be responsible for the leakage after it left the depot, or if he would put the two barrels in good order. Breed resides in the State of Ohio. The agent was often served with legal process in suits against defendant. Plaintiff sued for the wholesale price of the oil. No freight was paid or tendered.

The jury returned a verdict for the plaintiff. Whereupon the defendant moved for a new trial upon the following grounds:

1st. Because the verdict was contrary to the law and the evidence.

2d. Because the verdict was contrary to the following charge of the Court: "That if the said lessee had an agent in the county on whom service of writs could be perfected, an attachment would not lie."

3d. Because the Court erred in the following charge: "If the goods are in bad order by the fault of the carrier, the consignee may require him to put them in order before he receives them, so far as it is practicable for the carrier to do so, and if there is anything more for the carrier to do before he can deliver the goods in the condition his contract requires him to deliver them in, he is not in a condition to demand the freights, and if such is the case, and he refuses to deliver the goods in the condition the consignee has the right to require them, and puts it on that ground, and not on the ground that freight is not paid or tendered, then the jury might presume that the consignee stood ready to pay the freights and take the goods whenever he could get them in the condition he demanded they should be put in. I say the carrier may be required to

put the goods in such order as he received them, so far as it is practicable to do so, by tightening hoops, etc., but he could not be required to perform an impossibility, as to put back a fluid that had leaked out, or the like. It is for you to find what condition these goods were in when this carrier received them, and who it was that demanded too much of the other, and by whose fault the goods were not delivered and received."

4th. Because the Court erred in charging as follows: "That the law presumes that when a carrier receives goods he receives them in good order, but this is only a presumption where nothing appears to the contrary, and may be rebutted by facts or circumstances."

The Court refused a new trial, and the defendant excepted upon each of the aforesaid grounds.

PRINTUP & FOUCHE, for plaintiff in error.

WRIGHT & FEATHERSTON, for defendant.

McCAY, Judge.

1. Section 3199 of Irwin's Revised Code gives in terms the right of attachment, if the debtor resides out of the State. Section 3330, whilst it does provide that the lessees of a railroad shall be liable to suit, as the company, does not repeal section 3199. That it does not do so in terms is plain, nor do we think it fair to say that it does so by implication. The great object of section 3199 was to make the lessees, however they might be scattered, or wherever they might live, suable in one place, and that place the same as was provided for suing the corporation into whose *franchises* the lessees had stepped. Could it be inferred from this that the lessees are not suable if the plaintiff so choose, as other joint obligors? The statute does not say they shall be sued so and so, but that they shall be *liable* to be sued so and so. Nor does it follow that because it is not impossible to sue one by ordinary process an attachment will not lie. One may conceal himself.

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He may be removing or about to remove out of a county. He may be causing his property to be moved; he may be a non-resident, and yet may in fact be here. In all these cases ordinary process will lie. He may be served with a writ, especially as that service may be by leaving it at his most notorious place of abode. We cannot, therefore, say that because the Legislature has given the remedy against lessees provided in section 3330, it intended to repeal the attachment law in so far as it authorizes attachments against non-residents.

2. It seems nothing but common justice to say that if a carrier has, by his fault, so injured the cask in which a liquid is contained as that it cannot be moved without *further damage*, that he cannot compel the owner to take it in that condition. It is practically a total loss. If left as the carrier has by his fault made it, the loss will be total. This is not like the case of rotting goods, or even of damaged goods. Here the parties have provided a safe barrel to hold their oil, and the carrier has damaged that barrel so that to move it will cause the loss of the oil. It is capable of repair. It seems to us plain that the carrier ought to repair it—restore it, so far as he can—to the condition it was in when he got it, so that the owner may remove it without further loss. As the carrier in this case had something more to do, the freight was not demandable.

3. Whatever may be the rule as to the presumption of the condition in which goods are received, it is certainly true that the carrier will be presumed to have received the goods in good order for *shipment*, that is, that they were in such a condition that they could be moved without loss. A carrier is not bound to receive goods which cannot be moved without loss. A man may have a right to compel a carrier to ship damaged goods, but he cannot compel him to ship goods that are so badly packed as that they cannot be transported. At any rate, it is but a fair presumption that when the carrier got the goods they were in such a condition as that they were capable of being transported.

Judgment affirmed.

Findlay *et al.* vs. Artope.

RICHARD ROE, casual ejector, and CHRISTOPHER D. FINDLAY *et al.*, tenants in possession, plaintiffs in error, vs. JAMES B. ARTOPE, trustee, defendant in error.

By a marriage settlement a trustee was appointed and the property vested in him for the use of the wife, with power in the wife to dispose of the the property by will, and if she died leaving children and without executing a will, then to those children and their legal representatives in equal degree. The trustee brought ejectment for a portion of the trust property laying a demise in his name as trustee for the wife and children. Pending the action the wife died:

Held, That the action did not abate, but that the same may be prosecuted for the recovery of the property, so that the trustee may be enabled to execute the trust by turning over the possession to those who may be entitled, and to that end may make such amendment and add such demises as may be necessary to make the children formal parties.

Ejectment. Abatement. Trusts. Pleading. Before Judge COLE. Bibb Superior Court. April Adjourned Term, 1872.

James B. Artope, as trustee for Mrs. Elizabeth W. McLaughlin and her children, brought ejectment against Robert B. Findlay, Charles S. Findlay, George W. Findlay, Christopher D. Findlay as trustee for his wife and children, Mary H. Findlay, in her own right, and as guardian of her minor children, Arthur and Amanda Findlay, for a lot of land in the city of Macon. Pending the action Elizabeth W. McLaughlin died, and *scire facias* was issued requiring the defendants to show cause why her children should not be made parties plaintiffs in place of James B. Artope, trustee. The defendants objected to this proceeding, upon the grounds that said suit had abated and that the children were not the legal representatives of Elizabeth W. McLaughlin, nor proper parties to the action.

Upon the hearing of this issue by the Court, the plaintiffs introduced in evidence a marriage settlement, executed on December 8th, 1830, between Alexander R. McLaughlin and his intended wife, Elizabeth W. Bugg (the deceased) by which her property was vested in a trustee, for her use, with power of disposition by will, and in case said power was not executed,

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then, on the death of said Elizabeth W. Bugg, to vest in her child or children and their legal representatives in equal degree, and in case of there being no child or children, then to vest in Alexander R. McLaughlin. It was admitted that James B. Artope had been appointed by the Chancellor as trustee for Elizabeth W. McLaughlin and her children.

The Court held that the action did not abate on the death of Elizabeth W. McLaughlin, and that new demises might be added, making her children parties. To which ruling the defendants excepted.

WHITTLE & GUSTIN, by JACKSON & CLARKE, for plaintiffs in error.

JOHN RUTHERFORD; S. HALL, by CLARK & GOSS, for defendant.

TRIPPE, Judge.

From the petition or declaration, the real plaintiff in this action is James B. Artope, as trustee for Mrs. McLaughlin and her children. By the death of Mrs. McLaughlin, one of the *cestui que trust*, it is plain that *by the pleadings* the action did not abate. It could be continued and a recovery had for the use of the other beneficiaries in the trust, if the evidence showed that it was a trust of a joint interest of the estate or there was the right of survivorship in the children. We say this is so from the pleadings. But on the death of Mrs. McLaughlin a motion was made to make her children parties in their own right, which the Court allowed. In support of the motion, a deed of trust was exhibited under which the right to the property in dispute is claimed, in which deed there was a trust created for the separate use of Mrs. McLaughlin, with power of disposition by will, and if she died without executing the power, then the property was to go to her children, and if she died without children, to her intended husband. The deed was executed in contemplation of marriage, by the parties to said marriage and the trustee.

There were no children at the time the deed was executed, and the remainder created was contingent, both because it was uncertain whether the power given would be executed, and if it were not, then the ulterior limitation could not take effect unless the beneficiary for life died without children. Here, then, was a trustee not only to protect the interest of a married woman, but contingent remainders. It is the duty, and may be said to be the first duty of a trustee to protect and defend the title to the trust estate: Perry on Trusts, section 328; and it is his duty to consult the interest of both the tenant for life and the remainderman: Perry on Trusts, 539. A trustee holds as much for the benefit and protection of remaindermen as for life tenant: Hill on Trusts, 384. These obligations resting on the trustee are so obviously right and proper that neither argument or authority is needed to show that they exist.

The application is plain. In this case the trustee not only had the right, but if the title to these premises be in him it was his duty to bring this action when it was instituted. If brought as trustee solely for the tenant for life, a recovery would have put him in possession—a possession he was bound to maintain—first for the life tenant, and at her death equally bound to turn over to the remaindermen. It is an action for a wrong done to the rights of both, to-wit: the party who had a particular beneficial interest, and to the rights of those who had the ultimate title; and as the duty resting on the trustee reached to each of these parties, he was bound to protect them against a wrong doer. If, then, the rights and interest of these children were so closely connected with the right of this trustee to recover the possession, insomuch that their right to the possession so recovered would have instantly accrued on the death of their mother, why may they not come in at her death and prosecute the suit and thereby accomplish the same result in their own names which, during her lifetime, would have been done in the name of the trustee? Or why may not the trustee have new demises laid in the name of

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those to whom he was thus bound, as the final beneficiaries under the very deed by which he claims as trustee?

It may be said if the trustee recover solely as trustee for Mrs. McLaughlin, he would only recover for a life tenant, whereas by the proposed amendment there may be a recovery of the whole interest absolutely. But is that true in such a sense as to affect the real merit of the question? We have seen that he is bound to defend and protect the title to the trust estate, to consult the interest of the remainderman and tenant for life, and holds for both. If so, whenever he comes into possession by suit or otherwise, it enures to the benefit of both.

It is true that in ordinary cases where the action is brought by the tenant for life, and he dies *pendente*, the suit can only be continued by his representative, and for *mesne* profits. But in such cases there is no relation whatever between that representative and the remainderman or reversioner so far as either title or possession is concerned; and therefore he cannot possibly have anything to do with the possession. Nor did the tenant for life sustain such relation to the title, or to other parties in interest, as does a trustee in a case like this, whose duty, or liability, or obligation is not fully determined by the death of the tenant for life, even though that tenant be technically his only *cestui que trust*. We think the interests of all parties who have rights such as these children, would be better protected and enforced under the rule we lay down, than to require a suit in which they were so nearly interested to be abandoned, and new proceedings instituted.

Judgment affirmed.

JOHN TATE, plaintiff in error, vs. ROBERT J. COWART, Judge of the City Court of Atlanta, defendant in error.

1. A motion for new trial was overruled, and the decision affirmed by the Supreme Court; the defendant then moved to set aside the judgment upon the ground that it was rendered by a Court having no jurisdic-

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tion of the case; this ground was one of the points made upon the motion for a new trial; the motion was overruled, and defendant excepted. The Court committed no error in refusing to certify the bill of exceptions. (R.)

2. Where a motion was made for a new trial on the ground that no jurisdiction was shown on the face of the indictment, this Court will treat that ground as a motion in arrest of judgment. (R.)

Mandamus. Bill of exceptions. Practice in the Supreme Court. Before Judge COWART. City Court of Atlanta. March Adjourned Term, 1873.

For the facts of this case, see the decision.

THRASHER & THRASHER, for relator.

No appearance for respondent.

WARNER, Chief Justice.

This is an application for a *mandamus* to compel the Judge of the City Court of Atlanta to sign a bill of exceptions. A motion for a new trial in a criminal case was made in the Court below and overruled, the case was brought before this Court by writ of error, and the judgment of the Court below affirmed. No second writ of error will be allowed as to any ground embraced in the original motion for a new trial, and a *mandamus* requiring the Judge of the Court below to sign and certify such second bill of exceptions will not be granted: See *Perry vs. Gunby*, 42 *Georgia Reports*, 41. The motion to set aside the judgment in this case on the ground that the Court had no jurisdiction, was included in the first bill of exceptions, and was necessarily decided by this Court in its affirmance of the judgment of the City Court. If this Court had been of the opinion that there was no jurisdiction shown on the face of the bill of indictment, we would have treated the motion for a new trial on that ground as a motion in arrest of judgment, and would have ordered the bill of indictment quashed.

Let the rule for *mandamus* be discharged.

Richmond & Company *vs.* Phillips & Flanders *et al.*

J. L. RICHMOND & COMPANY, plaintiffs in error, *vs.* PHILLIPS & FLANDERS *et al.*, defendants in error.

When exceptions were filed to an award, which were on demurrer held by the Court below to be insufficient, and it appeared by the record that the exceptions were on the ground of a mistake alleged to have been made by the arbitrators in charging the excepting parties with certain items, especially one of \$8,500 which, it was alleged was clearly not a proper charge against him as would appear by the evidence, which evidence was partly set forth in the exceptions and partly referred to as contained in the books of the parties who were merchants, which books, the exceptions stated, were in the presence of the Court, but being voluminous, were not attached by abstract:

Held, That the contents of the books were a necessary part of the exceptions, and the plaintiff in error having failed to complete his record in the Court below by having such abstract in fact attached and sent here as part of the record, under the certificate of the Clerk, this Court will not reverse the judgment of the Court below, it being impossible for us to say, in the absence of said abstract, whether he was right in his judgment or not.

Award. Exceptions. Evidence. Before Judge HOPKINS. Fulton Superior Court. April Adjourned Term, 1872.

Two suits were pending in Fulton Superior Court against J. L. Richmond & Company, one in favor of Phillips & Flanders, and the other in favor of William R. Phillips. They were referred to arbitration and awards made in both cases against the defendants. Exceptions were filed to the awards, containing all the evidence submitted to the arbitrators, except the books of account which were used by consent at the hearing without being incorporated therein. Reference is made to the evidence in the various exceptions as sustaining them. The exceptions were overruled, and the awards made judgments of the Court. Neither the books of account, nor any abstract therefrom were embraced in the exceptions passed upon by the Court below, nor in the bill of exceptions by which the case was brought to this Court.

Richmond & Company excepted to the decision making the awards the judgments of the Court.

GARTRELL & STEPHENS; PEEPLES & HOWELL, for plaintiffs in error.

P. L. MYNATT, for defendants.

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McCAY, Judge.

When an award is returned to the Superior Court and spread upon its minutes, it is subject to exceptions, on the ground that it is the result of accident, mistake or fraud of some one or all of the arbitrators or parties, or is otherwise illegal. These exceptions must be in writing and be under oath; Revised Code, section 4184. If the exceptions set forth such facts as show that if these facts be true, any of the causes for setting aside an award exist, and the statement is not disputed, it is a mere question of law whether the award falls or not. There is no issue, no question of fact for trial, and the jury has nothing to do with it. If the exception be that there was a mistake made of a material character, in its effect upon the result, such a detail of the facts must be made as will satisfy the Court that if they be correctly stated, there has been such a mistake as requires the award to be vacated.

In the case now before us, the excepting party alleges a mistake in this, that the evidence before the arbitrators is so distinct, clear and uncontradicted, that Phillips never paid the \$3,500 00, or arranged it for their benefit and to their credit with Phillips & Flanders, that it only can be by some strange mistake that the arbitrators have decided in his favor on this point.

We are not clear that the evidence as set forth and actually contained in the exceptions does not affirmatively show sufficient to rebut this presumption, since both Phillips and his son swear that Richmond & Company did get credit on the books of Phillips & Flanders for this sum, and it may be that the arbitrators did in fact deduct it from Phillips & Flanders' account. It is plain that they deducted something, since they reduced the account to less than \$5,000 00. But the excep-

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tions show that the books of Phillips & Flanders and of Richmond & Company were before the arbitrators, and that the Judge in his decision of the demurrer was, by consent, to consider the books—then in Court—as before him, and as forming an exhibit to the exceptions.

It appears that this exhibit has never been perfected. The record, as now before us, under the certificate of the clerk of the Superior Court, contains no such abstract of the contents of the books.

It is true that the record does contain a long account of Richmond & Company attached as an exhibit to their plea in the original suit, and also an account of Phillips & Flanders' attached in the same way to their original declaration. But both of these only purport to be the debit side of their respective books, and we do not know that the books, if inspected, would support either of them. It is also true that the bill of exceptions contains an account of Phillips & Flanders, with an admission that this is their account as introduced in evidence to the arbitrators; but even this does not purport to be an abstract of the books as they were before the Judge at the hearing. An abstract of these books is a necessary part of a complete record of the case. The contents of the books were a necessary part of the exceptions to the award, and though the parties might consent for the Judge to use the books instead of an abstract of them, the record is not perfect for a hearing before this Court until that abstract is attached to the exceptions. We can only know what the record is by the certificate of the Clerk, or by the agreement of the parties, not even the Judge has a right to certify what the record is.

We cannot, therefore, undertake to do anything but affirm this judgment. The parties have seen fit to come before us with a record that does not show the Judge to be in error.

Judgment affirmed.

Headrick & Brother *vs.* The Virginia, etc., Railway Company.

HEADRICK & BROTHER, plaintiffs in error, *vs.* THE VIRGINIA AND TENNESSEE AIR LINE RAILWAY COMPANY, defendant in error.

1. Under the Act of Congress, passed March 3d, 1851, entitled, "An Act to limit the liability of ship owners and for other purposes," the owners of a steamer, which was a "first-class freight boat," and "a seagoing vessel," engaged in the carrying trade between Baltimore, Norfolk and Portsmouth, are not liable for the loss of goods by the destruction of the vessel and cargo by fire, unless caused by the design or neglect of the owners. Nor does the fact that such owners have formed an association with other companies as carriers, extending their business as carriers into the interior, affect the question of liability for such loss.
2. When the general charge of the Court as to the negligence was correct, an omission to charge as to any particular fact in the testimony connected with that question, was not error. If a more specific charge had been desired, it should have been requested.

Carriers. Negligence. Charge of Court. Practice in the Superior Court. Before Judge HARVEY. Whitfield Superior Court. October Term, 1872.

Headrick & Brother brought assumpsit against the Virginia and Tennessee Air Line Railway Company for \$265 00, damages sustained by them on account of the failure of the defendant to transport, according to its agreement, certain articles of merchandise from the city of Baltimore, in the State of Maryland, to the town of Tunnel Hill, in the State of Georgia.

The defendant pleaded the general issue, and for further plea that said merchandise in plaintiff's declaration mentioned, was at Baltimore on February 25th, 1870, carefully shipped on the steamer New Jersey, a seaworthy steamboat, to be transported across the Chesapeake Bay to the city of Norfolk, in the State of Virginia, which was in regular course of transportation towards the point at which said merchandise was to be delivered. That afterwards, and while said goods were on board of said steamer, and in course of transportation across the Chesapeake Bay, the said steamer, without fault of defend-

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ant, was consumed by fire, together with said merchandise. That in the receipt or bill of lading given to the plaintiffs for said goods, it is expressly stipulated that the defendant should not be liable for any damage to said merchandise by fire or other casualties. That the fire aforesaid was communicated to said steamer and goods without any negligence or want of care on the part of the defendant.

The plea was sustained by the testimony. The Court charged the jury as follows: "That the Act of Congress, passed in 1851, excepts sea-going vessels or vessels used upon the ocean from the provisions of our Code and of the common law prescribing the liability of common carriers. That if the evidence shows that plaintiffs' goods were destroyed by fire, on a vessel, such as is described in the Act of Congress, unless it is shown by the proof that the fire was caused by the design or neglect of the owner or owners of said vessel, the design or neglect of agents, under the Act, would not entitle the plaintiffs to recover in such case. Under said Act of Congress, the shipper and the owner may make a contract extending or limiting the liability of the carrier. If you have before you a shipper's receipt or bill of lading specifying the terms upon which plaintiffs' goods were to be shipped, made by the ship owner or carrier and accepted by the plaintiffs or their agent, the jury will be authorized to consider said receipt as a contract under said Act, under which said goods were to be shipped.

"With reference to the kind of vessel embraced within the provisions of the first section, it is proper to state that no canal boat, lighter or other vessel used in inland waters, is included within the provisions of said statute. But, if the vessel is shown to have been such as is usually used as a sea-going vessel, and suited to the transportation of freights from one port to another, along the coast of the United States, loss occurring on her by fire, not shown to be caused by the design or neglect of the owner, will not fall upon said owner."

The jury returned a verdict for the defendant. Where-

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upon the plaintiffs moved for a new trial upon the following grounds:

1st. Because the Court erred in the charge to the jury in reference to the effect of the Act of Congress of March, 1851, on the liability of the defendant.

2d. Because the Court erred in failing to instruct the jury as to the effect of the presence of matches and other combustibles with the freight, in changing the burden of proof.

The motion was overruled and the plaintiffs excepted.

The case was tried before Judge Parrott; he having died soon thereafter, the motion for a new trial was heard by Judge Harvey.

W. K. MOORE, for plaintiffs in error.

J. E. SHUMATE; D. A. WALKER, for defendant.

TRIPPE, Judge.

1. By the common law, the owners of ships engaged in transportation were common carriers, and were liable as insurers against loss, without limitation as to the waters upon which the ships were navigated: 6 Howard, 334; Abbott on Shipping, 395. This rule of liability was altered in England by several Acts of Parliament, and its stringency greatly relaxed.

On the 3d of March, 1851, an Act of Congress was passed, entitled "An Act to limit the liability of ship owners, and for other purposes," which provided that no owner of any ship or vessel shall be liable to answer for any loss or damage which may happen to any goods or merchandise which shall be shipped on board any such ship or vessel, by reason of any fire happening on board the same, unless such fire is caused by design or neglect of such owner. The seventh section provides that the Act "shall not apply to the owners of any canal boat, barge or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation."

The defendant was an association composed of several trans-

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portation companies, including the Baltimore Steam Packet Company, who were owners of the steamer New Jersey, a first-class freight boat, and a sea-going vessel, engaged in the carrying trade between Baltimore, Norfolk and Portsmouth. The suit was brought by plaintiffs for goods which were put on board said steamboat at Baltimore, for transportation through the Chesapeake Bay to Norfolk, and thence to Tunnel Hill in this State. The vessel and the goods were destroyed by fire on the night of the same day it left Baltimore, and from the finding of the jury, the loss occurred without design or neglect of the owners. Defendants claim they are not liable, under the provisions of the Act of Congress above quoted. Plaintiffs insist that the case is within the exceptions of the seventh section of the Act and the common law rule of liability applies. In *Watson vs. Marks*, second volume, *Law Register*, 157, it was held in the United States District Court, Eastern District of Pennsylvania, that this Act applied to vessels employed in the coasting trade on the seaboard. The case of *Moore et al. vs. American Transportation Company*, 24 *Howard's Reports*, 1, was an action against defendants as common carriers for hire, by canal boats and steam propellers from New York to Detroit, and was for goods which were not delivered on account of the burning on Lake Erie of the propeller in which the goods were shipped, the goods being put on board at Buffalo for transportation to Detroit. The defendants set up the same defense which is made in this case. Two points were urged in the argument—the character of the vessel employed, and that the navigation on Lake Erie was not inland. Upon the first, the Supreme Court of the United States say, “It is declared that the Act shall not apply to the owner of any *canal boat, barge or lighter*, or to any vessel of any description used in rivers or inland navigation. It will be perceived that certain craft is excepted from the Act *eo nomine* and these a class of vessels without any designation other than by a reference to the waters or locality in which used. But the character of the craft enumerated may well serve to indicate to some extent, and with some reason, the

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class of vessels in the mind of the law makers, which are designated by the place employed. This class may well be regarded *cjusdem generis*, and thus aid in interpreting the true meaning of the words of the Act, namely: vessels "used in rivers or inland navigation." In reference to the navigation on Lake Erie and Lake Michigan, the Court say, "the policy and justice of the limitation of the liability of the owners, under this Act of 1851, are as applicable to this navigation as to that of the ocean," and add, "the Act was designed to promote the building of ships and to encourage persons engaged in the business of navigation, and to place that of this country upon a footing with England and on the continent of Europe."

The burning of the steamer Lexington on Long Island Sound, and the decisions made against the owners in the cases which grew out of said burning, led to the passage of this Act. Although the law upon this subject was well settled before these decisions, yet similar cases had been of such rare occurrence that ship owners did not seem, until they were made, to be fully aware of their liabilities.

In the arguments of counsel and in the decisions made, both in the Supreme Court of Michigan: 5 Michigan, 368; (1 Cooley,) the suit having been brought in the Courts of that State, and in the Supreme Court of the United States, in 24 Howard, *ut supra*, it seemed to be conceded or taken for granted that the navigation on Long Island Sound clearly came within the operation of the statute, and is not included in the exceptions of the 7th section. If so, then the navigation on Chesapeake Bay from the ports of one State to those of another State in "sea-going" vessels, stand on the same footing. In the case referred to, the Court further say, "the Act can apply to vessels only which are engaged in foreign commerce, and commerce between the States. The purely internal commerce and navigation of a State are exclusively under State regulation."

But it was argued that the Baltimore Steam Packet Company being associated with others who extended their business

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as carriers into the interior of the country, would deprive them of the benefits of the Act. We do not think this affects the question. A feature in the case of Moore and the American Transportation Company was very similar to this fact in this case. The American Transportation Company was sued as a common carrier for hire, by *canal boats* and steam propeller from New York to Detroit. By the very terms of the seventh section, *canal boats* were excepted from the operation of the Act, and yet that company made such craft special means in the business of the organization. Still, the loss of the goods having occurred on the waters of Lake Erie, by the destruction by fire of the steam propeller, the company was held entitled to the protection of the Act. The similarity between the two cases is evident.

2. Plaintiff in error complains that because certain facts were proven suggestive of negligence on the part of defendant, the Court below erred in not charging more specifically with reference to the case as made by those facts. The general charge of the Court as to negligence was correct, and to entitle the plaintiff to claim as error an omission to charge on a special point founded on any particular fact, he should have called the attention of the Court to it, and requested the charge. We, therefore, affirm the judgment of the Court below on all these points.

Judgment affirmed.

RUFUS B. BULLOCK, Governor, for use, etc., plaintiff in error, *vs.* JAMES KING *et al.*, defendants in error.

Where, pending an action on a sheriff's bond, the sheriff and one of the securities die, the plaintiff may proceed against the surviving securities. (R.)

Sheriff's bond. Before Judge HARVEY. Floyd Superior Court. July Adjourned Term, 1872.

For the facts of this case, see the decision.

Craig vs. Pope.

W. D. ELAM, by T. W. ALEXANDER, for plaintiff in error.

UNDERWOOD & ROWELL, for defendants.

WARNER, Chief Justice.

The plaintiff brought her action on a sheriff's bond against the sheriff and his securities. Pending the action the sheriff and one of the securities died. Before the case was submitted to the jury the death of the parties was suggested. The plaintiff's counsel then announced that he would proceed against the other parties on the bond alone. The defendants' counsel then demurred to the plaintiff's declaration, on the ground that the securities on the sheriff's bond were not liable according to the case made by the pleadings. The Court sustained the demurrer, and ordered the case dismissed as to the securities on the sheriff's bond. Whereupon, the plaintiff excepted. In our judgment, the Court erred in dismissing the plaintiff's action, in view of the provisions of the 3396th section of the Code.

Let the judgment of the Court below be reversed.

JAMES W. CRAIG, plaintiff in error, vs. JOHN D. POPE, defendant in error.

When a suit was pending, on an express contract, and the defendant, after filing a plea of the general issue, under oath, withdrew his plea and filed the same plea not under oath:

Held, That under the Constitution of 1868, it was the duty of the Court to render a judgment for the plaintiff, on proof of the allegations in the declaration, and it was error in the Court to permit the defendant to introduce evidence in support of his plea.

Practice. Pleading. Before Judge HOPKINS. Fulton Superior Court.

Craig brought assumpsit against Pope on an express contract. The defendant filed a plea of the general issue, under

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oath. When the case was called for trial, the defendant withdrew the plea which had been entered, and filed the same plea not under oath. Counsel for plaintiff then proposed to treat the case as in default, and on proof of the allegations in the declaration, that the Court should enter up judgment. The Court refused to allow this, but on the contrary, ruled that it would try the case, and that plaintiff and defendant should introduce their evidence before him, and he would render his judgment.

After hearing the case, the Court rendered judgment for the defendant. Whereupon, the plaintiff moved for a new trial, upon the ground that the Court erred in the aforesaid ruling. The motion was overruled, and plaintiff excepted.

THRASHER & THRASHER; ROBERT BAUGH, for plaintiff in error. •

L. E. BLECKLEY, for defendant.

McCAY, Judge. •

The Constitution of 1868, Article V., section 3, paragraph 3, says: "The Court shall render judgment without the verdict of a jury in all civil cases founded on contract, where an issuable defense is not filed on oath." It is significant on the point now under consideration that the language used is not that the Court shall *try*, without the intervention of a jury, such cases, but that the Court shall *give judgment without the verdict of a jury*. It does not seem to have been contemplated there should be a trial. Taking the language literally, and without reference to the previous history of pleading and practice in this State, the construction would very naturally be, that the statements of the plaintiff are to be taken for true, and a judgment to be rendered without more, according to the facts as set forth in the declaration. A judgment is the conclusion of the law after the facts have been ascertained, and it would be no more than a literal construction of this language to say that it means the Court shall treat the defendant as

wholly in default, and as having admitted the plaintiff's statements to be true, and render judgment accordingly, without *any* verdict, or true saying, or finding of the facts.

But since the Act of 1799, the effect of a default in this State has never been so much as this. The plaintiff must still make out his case: Act of 1799, section 10; Revised Code, section 3405. And the practice since 1868, when this requirement of a sworn plea was introduced, has been uniform to treat the failure to file a plea under oath simply as entitling the plaintiff to a judgment by default, not in the common law sense of the word, but as it has been understood in this State since 1799. As we have said, this is, perhaps, a construction of the Constitution of 1868 more favorable to the defendant than is at first sight suggested by the words of the Constitution, but we are not disposed to interfere with the practice, founded, as it is, upon the idea of a judgment by default, as long understood in this State. The effect of a non-appearance in this State is, in general, not to admit the plaintiff's statements, but to announce that the defendant has nothing to say—he leaves the matter to the Court. If the plaintiff can satisfy the Court that he is right, he may have a judgment.

The end sought to be attained by the introduction into the Constitution of the State of this clause was not, as we think, to introduce a mode of trial by a Judge, instead of the ancient mode of trial by jury. Whatever may be the case now with a certain class of minds, as to the opinions they have of jury trials, we do not think any distrust of that ancient system existed in the Convention of 1868. It put a clause into our fundamental law elevating the qualifications of jurymen, but it guarantees the right of trial by jury, as heretofore used. The real intent of the clause under consideration was to prevent delay. With this view, appeal trials were abolished, and this provision made that there should be no trial by jury unless the defendant would, under oath, set up a substantial, issuable defense. It would, indeed, be a strange system if, as is contended, the only change intended was to transfer the trial from the jury to the Judge, if the defendant failed to swear

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to his plea. *Cui bono?* What end is to be attained? Is there any more reason to have a trial by jury, if the plea is sworn to, than if it is not? What motive is there for providing that if the pleas are sworn to, the trial shall be before a jury, but if they be not sworn to, the same pleas, the same issues, shall be tried by the Court? What end is to be attained, and what motive presents itself as the ground for sending a sworn plea to a jury, and trying an unsworn one by the Judge?

Under the construction heretofore put, and under the practice since 1868, a great progress is made in the transaction of business. The defendant is in default unless his plea is sworn to. No issue is for trial, unless the defendant is able to verify the facts on which it is founded. The result is, that the number of issues for trial is largely lessened, and the public business is not hampered and delayed by pretended defenses.

Our judgment is, that in the cases covered by this clause, if there be no legal, issuable defense filed under oath, the case is in default, and the plaintiff is entitled to proceed to make out his case before the Judge, by the production of his evidence of debt, as has always been the effect of a judgment by default in this State. As a matter of course, this rule does not cover cases of open account where the defendant has been personally served. In such cases, if there be default, the judgment goes without evidence: Irwin's Revised Code, section 3405.

Judgment reversed.

MARGARET JOHNSTON, plaintiff in error, vs. JOHN R. JANES
et al., defendants in error.

1. If a guardian purchase land, intending to receive a promissory note on other parties, from an administrator in whose hands is the estate in which his ward has a share, and to pay for the land with such note, the consideration of which, is the purchase money of the same land when sold by the administrator, and he does receive the note from the

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administrator as the portion of the ward in said estate, and pays the whole price of the land with it, and takes the title to himself, it will so charge the land as a trust in the hands of the guardian, and his vendee who purchases with notice of such facts, as to entitle the ward through her next friend to assert her right of election between the fund thus appropriated, and the land thus purchased and paid for.

2. Under the proper construction of the Act of 1866, securing to the wife the property she had at marriage, or that may come to or be acquired by her during coverture, a guardian cannot make a compromise or accord and satisfaction with his female ward and her husband for her claim against him as her guardian, she being at the time a minor and having married after the passage of said Act.
3. If such compromise be made whilst suit is pending against the guardian in favor of his ward by her next friend, without the authority of the Court or the knowledge and consent of the next friend, it is so far a nullity that no deduction from the claim against the guardian can be allowed for what he may advance as a consideration for the compromise, unless it be shown that the same was applied for the use and benefit of the ward.
4. The admissions of the husband offered as evidence by the wife for the purpose of showing, in connection with other testimony, that the marriage was void, and thereby to relieve herself from any effect that his assent to such compromise might have, were properly rejected by the Court, as they are immaterial under the construction given to the Act of 1866.
5. An exemplification of the returns of a guardian to the Ordinary, though made several years after the actings of the guardian therein contained, and after the commencement of suit against him by his ward, are admissible in evidence when tendered by him, and such facts are circumstances, which with the other testimony in connection therewith, may be considered by the jury in determining the weight to be given to it.
6. Judgment is reversed in this case because the Court erred in not granting a new trial on the ground that the verdict was contrary to law and the evidence.

Equity. Guardian and ward. Husband and wife. Accord and satisfaction. Compromise. *Prochein ami*. Evidence. Returns. Before Judge HARRELL. Terrell Superior Court. May Term, 1872.

Margaret Johnston, a minor, by her mother and next friend, Lydia Johnston, filed her bill against John R. Janes and William Ware, making the following case:

Complainant's father died on the day of 186..., intes-

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tate, leaving a considerable estate, upon which one Martin P. Still became administrator. The defendant, Janes, was appointed, and is now the guardian of complainant. At the administrator's sale of the property of deceased, one Littleton Johnston bid off lot of land number one hundred and ninety-three, in the fourth district of Terrell county, for \$1,005 00, and said defendant, Janes, became security for the payment of the purchase money. In 1862 or 1863 it was agreed between said Janes and Still, the administrator, that Littleton Johnston should turn over his said bid to Janes, as the guardian of complainant, that Janes should take up said Johnston's note, by giving his receipt to said administrator for so much money paid to him as guardian, in part of complainant's interest in her said father's estate, and that said administrator should convey said land to Janes as complainant's guardian. This agreement was fully executed, with the exception that the said administrator conveyed said property to Janes, individually, instead of to him as guardian for complainant. Afterwards, in the year 1863, said Janes, claiming said property as his own, in consideration of about \$600 00 in gold, conveyed the same to his father-in-law, the defendant, Ware, who has since that time had possession of the same, enjoying the rents and profits, of the yearly value of about \$300 00. The land is now worth about \$2,000 00. Complainant repudiates the sale and claims the land. Complainant waives discovery and prays that Ware may be decreed to convey said land to complainant, and to account for the rents and profits; that Janes may be decreed to stand seized of said land as complainant's guardian; that the writ of subpoena may issue.

The defendant, Janes, answered the bill, substantially, as follows:

Admits that Littleton Johnston bid off the land in controversy at the administrator's sale, as charged in the bill, and that defendant became his security for the purchase money, to-wit: \$1,005 00, but alleges that one W. M. Craps became co surety with him. That the administrator conveyed said property by deed to Johnston, and defendant took a mort-

gage on the same for the purpose of securing himself as surety for the purchase money, but not being aware of the necessity of having the same recorded, he omitted to take this course until the note for the purchase money was due and in the hands of an attorney for collection, when he was informed that his said mortgage was postponed to other claims, and had thus become valueless. Defendant then thought that it was necessary for him to look after his own interest, and purchased said land from Johnston in his own name, and not as guardian, and paid Johnston by taking up his note held by the administrator. The consideration of the transfer of said note to him by the administrator was a receipt from him as guardian for that much money, as so much paid on account of his ward's interest in her father's estate. Defendant represented to the Ordinary of the county the transaction, and proposed to charge himself as guardian with the land, when said Ordinary informed him that this could not be done, "as no authority had been given or could be implied for that purpose." Defendant then advanced from his own funds to his ward \$1,005 00, and loaned it out at interest as her property. This money was repaid in the spring of 1863, and reinvested by him in interest bearing Confederate notes of the denomination of \$100 00 each. This investment was regarded at the time as so good, that defendant paid a premium out of his own pocket to obtain the notes. This money has since become worthless, but through no fault of defendant, and he now tenders it to complainant. Defendant admits the sale to his father-in-law, Ware, but alleges that he was paid therefor in a negro slave estimated as being worth \$1,005 00. Denies all combination, fraud and collusion, as charged.

The complainant introduced Littleton Johnston and the depositions of Augustus Jones. These witnesses sustained substantially the allegations of the bill, and showed that Ware purchased with notice.

The defendants, Janes and Ware, sustained, substantially, the facts set forth in the answer of Janes. Janes further tes-

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tified that in 1868 he was approached by one L. Johnston, the uncle of complainant, (not the witness in this case,) with a view to a settlement of this litigation. Complainant had recently married Phillips. This resulted in a settlement by which the defendant paid \$100 00 and took a release, signed by complainant and her husband.

The deed to the land in controversy, executed by Littleton Johnston to John R. Janes, dated January 1st, 1861, and the release, testified to by Janes, dated November 28th, 1868, were introduced.

W. F. Orr testified that he witnessed the release officially before it was signed by complainant, that he examined her when separate and apart from her husband, and she stated that she was perfectly willing of her own accord to sign it; that he saw no money paid to complainant, and does not know whether she received any or not.

Defendants introduced a return made by John R. Janes as guardian for complainant, on November 23d, 1866, to the Ordinary of Terrell county, by which he charged himself with \$1,005 00, received from Still, administrator, on January 1st, 1861, and credited himself with expenditures made from May 28th, 1860, and ending May 1st, 1864, amounting in the aggregate to \$480.08. This return was admitted over the objection of complainant's counsel.

It was admitted that complainant was married to Littleton J. Phillips in 1868.

Complainant, for the purpose of proving that said Phillips had a wife at the time he married complainant, proposed to introduce a certified copy from the records of the Ordinary of Heard county, showing by a copy of the marriage license and the return thereon that one Joseph L. Phillips was married to Ann E. Millow on February 23d, 1860, and to prove by Littleton Johnston that Littleton J. Phillips had admitted to him that he was the same person as Joseph L. Phillips, but had changed his name. This evidence, upon objection made, was excluded by the Court.

The jury returned a verdict for the defendants. Whereupon,

complainant moved for a new trial upon the following grounds, to-wit :

1st. Because said verdict was contrary to the law and the evidence.

2d. Because said verdict was contrary to the following charge of the Court: "That if the jury were satisfied from the evidence in this case that Janes purchased this lot of land for his ward, or that he purchased it with her money, and these facts were known to Ware at the time he bought, then complainant was entitled to a decree charging her guardian with the land and the profits thereof."

3d. Because said verdict was contrary to the following charge of the Court: "That if the jury believe from the evidence that Phillips was married after 1866, then he had no interest in this property, and if complainant was a minor at the time of the settlement in 1868, then the settlement is void, and they should disregard it in this case."

4th. Because the Court erred in excluding from the jury the certified copy from the records of the Ordinary of Heard county, and the admissions of Littleton J. Phillips, tendered to show a previous marriage.

5th. Because the Court erred in admitting in evidence the returns of John R. Janes, made after the institution of this suit.

The motion was overruled, and complainant excepted upon each of the grounds aforesaid.

VASON & DAVIS; A. HOOD; F. M. HARPER, by CLARK & GOSS, for plaintiff in error.

C. B. WOOTEN, for defendants.

TRIPPE, Judge.

1. No principle is more fully settled than the rule that if a person having a fiduciary character, purchase property with the fiduciary funds in his hands and take the title in his own name, a trust in the property will result to the *cestui que trust* or other person entitled to the beneficial interest in the fund with

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which the property was paid for. As if a trustee purchase with the trust funds and take the title in his own name, the trust results to the *cestui que trust*, or if a guardian purchase with the money of his ward, a trust will result to the ward: Perry on Trusts, section 127. In such cases the transaction is looked upon as a purchase paid for by the *cestui que trust*, as the beneficial interest in the money belonged to him, and the identity of the money does not consist in the specific pieces of money or bills, but in the general character of the fund out of which the payment is made and the fund may be followed so long as its general character can be identified: *Ibid.*, section 128. The *cestui que trust* or ward thus interested may assert her right either to the fund thus appropriated, or to the property which was purchased with it. And this can be done whilst the property is in the hands of the trustee or guardian, or if it be in the hands of their vendee who purchased with notice of such facts.

2. The ward in this case married whilst a minor, and after the passage of the Act of 1866, which says, that "all the property of the wife at the time of her marriage, whether real or personal or choses in action, shall be and remain the separate property of the wife, and all property given to, inherited or acquired by the wife during coverture, shall vest in and belong to the wife, and shall not be liable for the payment of any debt, default or contract of the husband." The question is made, can a guardian, with this Act in force, settle with his female ward whilst she is a minor, because she has married a man of full age. Before the passage of the Act the husband was entitled to all the property his wife owned or inherited, subject only to her equity, and might reduce it into possession by suit or otherwise, and it made no difference whether she was or was not a minor. By section 1830 of the Code, "a ward on arriving at majority or marrying a man of full age, may apply to the Ordinary for an order requiring the guardian to appear and submit to a settlement of his accounts." This was enacted before the Act of 1866, and was consistent with the law which gave the wife's property to the

husband, and only afforded another remedy in addition to one he already had for the enforcement of his rights as husband, to-wit: another means to reduce the wife's property into his possession. We do not think that the proper construction of the Act of 1866 or of the section of the Code quoted, as affected by that Act, would allow the guardian to make a compromise or accord and satisfaction with his female ward, whilst she is a minor, and her husband for her claim against him as her guardian. The husband has no power or right to demand or make a settlement. The property is not his, nor can it become his by getting it into his possession. A ward during minority cannot make a settlement. If he be a male, though married, it would not alter the case. If a female, she could only demand it under the old law, by virtue of her marriage with a man of full age, to whom the law gave her property. Now, she is as to her property a *feme sole*, with no power in the husband to demand or receive it. As a *feme sole*, before marriage, she could not claim it, and the logical result necessarily is, that she stands in relation to her property with all the rights and no more than the male ward has.

3. When suit is brought for a minor by a next friend who acts by authority of the Court, no compromise with the infant is of any force or effect, which is made without the knowledge or consent either of the Court or the representative of such minor. Even if made by consent of the next friend, it might require the sanction of the Court in the proper way to give it validity. But certainly Courts will not permit minors who are placed under their protection, to be thus dealt with, without their authority or the authority of the one appointed to defend their rights. Here the minor by next friend, instituted suit before reaching majority; the property claimed is largely more than the \$100 00 paid as a compromise. When suit was instituted she was under no obligation, or rather had no power to offer to refund, and if the defendant has any right under said payment of \$100 00, it is to claim an allowance for it, if it be shown that it was applied for the use and benefit of the ward.

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4. Under the construction given to the Act of 1866, no evidence touching the validity of the ward's marriage was material, and no injury could result to complainant from the rejection of the sayings of the reputed husband.

5. The returns of a guardian when allowed by the ordinary, and entered of record are *prima facie* evidence in favor of the guardian. If they are made long after the transactions occurred, which are contained in them, and after suit has been instituted by the ward, such facts may be considered by the jury in connection with the other testimony, in determining the weight to be given to them.

6. We think that under the evidence contained in the record, there should be a rehearing in this case, and reverse the judgment refusing a new trial.

Judgment reversed and a new trial granted.

JOHN SAVAGE, plaintiff in error, vs. E. D. SMYTHE & COMPANY *et al.*, defendants in error.

1. Where the plaintiffs loaned seventeen shares of railroad stock to the defendants, upon which to borrow money and transferred to them the title thereto, the stock to be returned on demand; and the defendants borrowed money from certain parties, transferring to them the title to the stock as collateral security with the consent of the plaintiff, the plaintiff cannot, upon a demand on defendants therefor, maintain an action of trover for the stock, before the indebtedness to secure which it was transferred became due. *Aliter*, if the defendants had failed to meet said indebtedness at maturity. (R.)
2. Mere non-feasance is not a conversion. (R.)

Trover. Conversion. Loan. Demand. Before Judge SCHLEY. Chatham Superior Court. May Term, 1871.

For the facts of this case, see the decision.

GEORGE A. MERCER, by HENRY B. TOMPKINS, for plaintiff in error.

HARTRIDGE & CHISOLM; HARDEN & LEVY, for defendants.

WARNER, Chief Justice.

1. The plaintiff brought his action of trover against the defendants to recover the value of seventeen shares of Southwestern Railroad stock which the plaintiff alleged the defendants had converted to their own use. On the trial of the case, the jury found a verdict for the plaintiff for the sum of \$1,819 00. A motion was made by the defendants for a new trial, which was granted by the Court, and the plaintiff excepted. It appears from the evidence in the record, that the defendants were partners, doing business in the name of E. D. Smythe & Company, that the plaintiff agreed to loan them the seventeen shares of stock for the purpose of raising money for the benefit of the firm. Plaintiff and Butler, one of the partners, who was the son-in-law of the plaintiff, applied to Palmer & Deppish for a loan of money, who were willing to make it, provided the plaintiff would transfer the title of the stock to them, to secure the payment of the money, which was done on the books of the railroad company. When the money borrowed from Palmer & Deppish became due, another loan was negotiated with Wallace Cumming & Company to pay it, thereupon, Palmer & Deppish transferred the stock on the books of the company to the defendants, who transferred it to Wallace Cumming & Company, they holding the title to the stock, as security for the money advanced by them. This was all done with the knowledge and *consent* of the plaintiff, who stated that the loan of the stock was to be returned to him upon his demand. When the firm of E. D. Smythe & Company was dissolved, the plaintiff made a demand of his stock from the defendants, but could not get it. Smythe said he would return it only when he got ready. The money, \$1,500 00, advanced by Wallace Cumming & Company to the defendants, for the security of which the title to the stock was transferred to them by the consent of the plaintiff, *has*

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not been paid, and the question in the case is, whether the plaintiff can maintain an action of trover against the defendants for a wrongful conversion of the stock, on the statement of facts disclosed by the record. According to my individual judgment, he cannot. Trover may be maintained when one has in his possession the personal goods of another, or has sold them, or used them without the consent of the owner, and refuses to deliver them when demanded. The defendants did not have *the possession* of the railroad stock when the plaintiff demanded it of them, but it was in the possession of Wallace Cumming & Company, where it had been placed by the defendants, with the plaintiff's *consent*. They had not made any unauthorized use of the stock against the plaintiff's consent, which, in law, would amount to a conversion of it.

2. Mere *non-feasance* is not a conversion as, if one employed to sell goods has neglected to sell them, or where one promises to pay money to redeem stock and does not do it. All that can be said in this case, is that the defendants by their *mere non-feasance*, have failed to pay the debt due by them to Wallace Cumming & Company to secure the payment of which the stock was transferred to them by the *plaintiff's consent*, and which they had the right to retain as against the defendants and plaintiffs, until their debt was paid. The demand of the stock by the plaintiff of the defendants, when they did not have the *possession* of it, and when he knew that they did not have the possession of it, and when he did not have a *right* to the *immediate* possession of it, did not change the legal aspect of the case, in my judgment, so far as the question of the conversion of the stock by the defendants is concerned. But the majority of the Court are of the opinion, that if it had been shown by the evidence in the record, that at the time of the plaintiff's demand of the stock or at the time of the commencement of this action, the debt of the defendants to Wallace Cumming & Company, had become due, and for the payment of which the stock was pledged with the plaintiff's consent, the refusal or omission of the defendants to pay that debt, and redeem the stock on demand of the plaintiff, would have

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been such a conversion of it as would authorize the plaintiff to maintain trover for its recovery, or the value thereof. Inasmuch, however, as the evidence in the record does not show whether the debt of the defendants to Wallace Cumming & Company was due at the time the plaintiff's demand of the stock was made, we all concur in affirming the judgment of the Court below in granting the new trial.

Let the judgment of the Court below be affirmed.

ATLANTA AND RICHMOND AIR LINE RAILROAD COMPANY,
plaintiff in error, vs. HENRY H. WOOD, defendant in error.

1. When a suit was brought against a railroad company for damages caused to the plaintiff by his falling into an excavation made by the company across the public highway, and it appeared in proof that the public highway had for years run in a particular place ; that on the approach of the railroad constructors to that place, the road had been turned so as to take a different route ; that within a week or ten days after the change, the plaintiff, traveling the road with his wagon and team, had taken the old route, it being in the night, and had been stopped by the cut or excavation ; that he had got out of his wagon to see what was the matter, and in passing to the front had fallen into the cut and broken his thigh, so as to cause him great pain, expense and loss of time, and so as to lessen his effectiveness as a working man one-fourth, for life, and so as to shorten his leg by three inches :

Held, That the burden of showing that the route of the road had been legally changed, was upon the defendant, and this could only be shown by production of the order, or by proof of such long established usage as to justify a presumption of such order.

2. The measure of damages in such a case is the actual injury suffered. This may include bodily and mental suffering. And when the Court added to this charge that the jury might include " the injury to his pride, his manhood : "

Held, That whilst the latter language is not strictly accurate, yet, as the proof shows that the plaintiff was permanently deformed by being lamed for life, the jury may well have understood the Court, as referring by his words to this deformity, and as the verdict is not excessive, this Court will not disturb it.

3. The verdict is not contrary to the evidence so as to justify the interference of this Court.

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4. Where the oral evidence is contained in the bill of exceptions, and the depositions are attached thereto as an exhibit, with a reference therein contained making them a part thereof, all of which is followed by the usual certificate of the Judge, the writ of error will not be dismissed. (See end of report. R.)

Railroads. Roads. New trial. Damages. Charge of Court. Before Judge HOPKINS. Fulton Superior Court. April Term, 1872.

Wood brought case against the Atlanta and Richmond Air Line Railroad Company, for damages alleged to have been sustained by him by reason of its negligence. The defendant pleaded the general issue. The evidence made the following case:

On the evening of the 21st of March, 1870, plaintiff left his home in Milton county, with his wagon, to which was attached two oxen and a mule, and started for the city of Atlanta. At about eight or nine o'clock in the night, he arrived at the place in DeKalb county where the public road, upon which he was traveling, crossed the track of defendant. The night was dark and it was raining a little. Plaintiff knew nothing of the railroad cut being there, until the team stopped and refused to go, when he got out of his wagon and went to his mule, which he found had turned round. It was so dark that he could discern nothing but that the mule was in the bushes. He then retraced his steps around the wagon to the left side, to ascertain what was the matter, when he fell into a cut made by the employees of defendant. The cut was eight or nine feet deep, nearly perpendicular at the side, and nothing placed there to prevent plaintiff from falling in. His right thigh was broken by the fall. He dragged himself a short distance and halloed for some two or three hours, until some persons came to his assistance and carried him on some bed clothes to the house of Mrs. Stewart. Plaintiff discovered no obstructions across the public road before he reached the cut. His right leg, by reason of said injury, is three inches and three-quarters shorter than the left. Remained in bed six weeks. Paid for medical services \$31 00. Lost four

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months from his farm. Had to hire a hand at \$10 00 per month, for three and a half months. Suffered great pain and is still subject to severe suffering at times. Was in his twenty-eighth year at the time of the injury. Had a wife and a small child. The injury has deprived him of about one-fourth of his ability to work on a farm, which was his occupation. His services before the injury were reasonably worth \$1 00 per day, since, not more than seventy-five cents. This difference has caused him to lose money, as the labor he has been enabled to do has not been sufficient to support his increasing family of children, now consisting of three, two girls and a boy.

The defendant had made a crossing for the public travel over the railroad; there were two small sapplings and some brush placed in the old road as a guide to the new crossing. These obstructions were insufficient to place any one on guard at night. The new road led around the cut into which plaintiff fell. The place where the plaintiff fell into the excavation was about twenty steps from the old road where it originally crossed the cut. The team was about twenty-five steps from the old road. The new road had been opened a week or two and had been used by the public, before the accident happened. It crossed the railroad track about one hundred feet from where the old road crossed before the excavation was made. It intersected with the old road about one hundred and twenty-five to one hundred and thirty feet from where it crossed the railroad. The road commissioners of DeKalb county notified defendant to keep up and in good order the crossing on the new road.

The jury returned a verdict for the plaintiff for \$4,200 00, Whereupon, the defendant moved for a new trial upon the following grounds, to-wit:

1st. Because the Court erred in charging the jury "that although a new road was opened and in use, if it was not legally established or adopted as the public highway, the plaintiff was not bound to take it." Such charge being erroneous, because the Court failed to state to the jury what would con-

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stitute a legal establishing or adopting of the new road as the public highway.

2d. Because the Court erred in charging the jury in reference to the measure of damages, "that the plaintiff might be entitled to recover compensation for his bodily and mental suffering, and for the injury to his pride, his manhood."

3d. Because the verdict was contrary to the law and the evidence.

The motion was overruled, and the defendant excepted upon each of the grounds aforesaid.

When this case was called in the Supreme Court, a motion was made to dismiss the writ of error, because the evidence adduced upon the trial was not identified by the presiding Judge in the Court below as true.

The evidence had not been made a portion of the record upon the motion for a new trial, but was brought up as a part of the bill of exceptions. The oral testimony was set forth in the bill of exceptions. The depositions were attached to the bill of exceptions, with the following reference thereto therein contained: "Copies of the answers to said interrogatories are appended to this bill of exceptions, as a part thereof, and marked Exhibit A." The certificate of the Judge, in the usual form, followed the depositions, and to it was attached the certificate of the clerk.

The motion, after consideration, was disallowed, the Court expressly overruling the decision in the case of *Reid vs. Reid*, 43 *Georgia Reports*, 175.

L. E. BLECKLEY; JOHN COLLIER, for plaintiff in error.

PEEPLS & HOWELL; P. L. MYNATT, for defendant.

McCAY, Judge.

1. Under our law there is no authority to alter a public road but by an order of the Inferior Court, (now the Ordinary:) Revised Code, sections 643, 645; Constitution 1868, Article V. section 5. The proof here is clear, that up to a

short period the road had for years been just in the track where the plaintiff's team went. But the road was changed in *fact*. Who changed it does not appear. The presumption is strong that it was done by the agents of the company, since the testimony is that the road continued as it had been until just before the work reached where it crossed the track. Even if the company had authority to make a new way, whilst the work at that precise point was progressing, it was of paramount necessity that the old track should be effectively blockaded, so that a traveler, by day or by night, might know there was an obstruction. But it is no part of this defense that the obstruction is lawfully there, if the old road is still the legal road. The only point of the defense on this branch of the subject is, that the road was permanently changed, and that the plaintiff, at the time of the fall, was not in the legal road. As we have said, there is no authority to alter a road except by order of Court. True, it is often done, but that does not make it lawful. It is not for private persons, nor even for overseers or road commissioners to alter a public road. Nothing but an order of the Court or permanent user can do this. Where the road had been located for years was the legal road, and if the change was made as contended, it was for the defendant to show it.

2. We do not wholly approve the language used by the Judge in his enumeration to the jury of the elements which go to make up the damages. The physical injuries of the plaintiff, and his mental and physical suffering, are proper elements. But when the Judge added "pride, manhood," we fear he used language calculated in its ordinary signification to open the door too widely. The injury to the pride, manhood of the plaintiff, depends so entirely upon the character and temper of the plaintiff, that it can hardly be said to be the direct result of defendant's act. It is a possible result, but other contingent circumstances preponderate in making any estimate upon it: Code, section 3017. But this charge can only have been understood by the jury, in view of the facts, as relating to that injury which came to the plaintiff by

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reason of his deformity—the mortification which it put upon him from having to pass through life deformed, lame, shorn of his full proportions as a man. And this was not an improper element in the damages. In this sense, the charge is only another way of saying that the plaintiff is entitled to damages for having been rendered deformed by the defendant's negligence. We do not see that the jury could have considered any such fanciful damages as depend only on the temperament of the plaintiff. There is a plenty of proof of real damage to justify the verdict. If this road was changed without authority of law—a trap dug and carelessly left open, to the detriment of those who, by night as well as by day, have a right to pass over the road—it was a gross wrong, and the road ought to pay for it.

3. We do not think the verdict contrary to evidence. This obstruction to the public highway was a wrong, so far as the evidence shows, and the plaintiff has seriously suffered from it, the damages given are by no means excessive, and the evidence justifies the verdict. It is only in a strong case where a new trial ought to be granted for excessive damages.

Judgment affirmed.

WILLIAM MARKHAM *et al.*, plaintiffs in error, vs. HAZEN & SONS, defendants in error.

1. If a draft be drawn on an individual, and the drawee, before its acceptance, form a partnership with others, and the partners agree to use in the business of the partnership the goods, for the payment of which the draft was drawn, and to pay for them, and they do so use them, and the partner who is the drawee accept the draft for the partnership, the acceptance is binding on the partners.
2. Where the name of the partnership is the "Republican Association," and whose sole business was the publishing of a newspaper, called "The Opinion," and the acceptance is "accepted May 24th, 1867, for the Opinion newspaper," (signed) "W. L. S.," and W. L. S. is one of the partners, it is a sufficient identification of the partnership to bind the partners.

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8. Where a case is fairly submitted to the jury, and there is positive evidence to support the verdict, and the Judge trying the case refuses a new trial, this Court will not interfere, unless the verdict be so decidedly against the weight of the evidence as to suggest that the finding was the result of improper or illegal influences or motives.

New trial. Bill of exchange. Partnership. Before Judge HOPKINS. Fulton Superior Court. April Term, 1872.

Hazen & Sons brought assumpsit against William Markham, Miles G. Dobbins, William L. Scruggs and Henry P. Farrow, as joint owners of the "Daily Opinion," a newspaper published in the city of Atlanta, on the following acceptance:

"\$175 00.

"KNOXVILLE, May 21st, 1867.

"Sixty days after date, pay to the order of ourselves one hundred and seventy-five dollars. Value received.

(Signed)

"HAZEN & SONS,

"To WILLIAM L. SCRUGGS, Atlanta, Georgia.

"Accepted May 24th, 1867, for the Opinion newspaper.

(Signed)

"W. L. SCRUGGS.

"Protested for non-payment, July 23d, 1867.

(Signed)

"D. G. JONES, Notary Public."

The defendants, Markham and Dobbins, pleaded the general issue, and no partnership.

Scruggs having been discharged as a bankrupt was dismissed from the case.

The plaintiffs introduced the acceptance sued on. Also, the depositions of Scruggs, to the following effect: Witness accepted the draft sued on for William Markham, Miles G. Dobbins, Henry P. Farrow and himself, the stockholders of the Opinion newspaper. The acceptance was for paper, which was afterwards used in the Opinion office, and for the benefit of the business of the Republican Association. The paper was at the State Road depot at the time of the sale and transfer of the property of the Opinion. The fact was mentioned by him at the time the sale was concluded, and the agreement was

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that the Republican Association should use the paper and pay for it when the bill became due. It was afterwards brought up and used under the direction of Mr. Dumble, the cashier and superintendent of the office. When witness sold out to the Republican Association, he stated the indebtedness of the Opinion to be about \$225 00, but this sum did not include the draft sued on, which was not then due. The trade between the Association and witness was closed on May 24th, 1868. The draft was accepted after the Republican Association had been organized, and on the afternoon of the day before the public announcement of the fact was made through the columns of the Opinion.

Plaintiffs introduced a copy of the Opinion, bearing date May 26th, 1867, and read therefrom an announcement signed by William L. Scruggs, directed as follows: "To the readers of the Opinion," to the effect that on that day was concluded the sale and transfer of the Daily Opinion office to the Atlanta Republican Association, and that his relation as editor and proprietor ceased from the date of that number. That all dues to the office, and all claims against the same will be receipted for or paid by the incoming proprietors, through their accredited financial agent or business manager. That the joint stock company, which succeeded him, was composed of gentlemen of the highest personal character, both as citizens and as business men. That they possessed ample means to make the company one of the strongest corporate bodies in the State, and that he doubted not but that they would do so.

The defendant introduced the depositions of William Markham, to the following effect: On May 27th, 1867, defendants entered into partnership under the firm name of the Republican Association, for the purpose of establishing in the city of Atlanta a newspaper called the "Daily Opinion," Dobbins, Farrow and this defendant purchasing from Scruggs all of his interest in said newspaper except eight shares, Scruggs formerly owning the entire property. He (Scruggs) was one of the partners, and his duty was to superintend the publishing of the paper. He was not the financier of the company.

Varney A. Gaskill held this position for about one month after the formation of the aforesaid firm. There was an agreement between the defendants to pay the liabilities then existing against the Opinion, which were represented by Scruggs to be \$220 00, and accordingly paid him \$225 00 to cover everything. The draft sued on was accepted before the formation of said partnership. Said firm did not agree to pay said draft, knew nothing about its existence.

The depositions of Dobbins were introduced, which substantially corroborated the evidence of Markham.

The jury returned a verdict for the plaintiffs. Whereupon, the defendants moved for a new trial upon the following grounds:

1st. Because the verdict was contrary to the law and the evidence.

2d. Because the verdict was contrary to the following charge of the Court: "If the order for the paper was made by Scruggs, and the paper was shipped to him, and before it was actually received, and whilst it was in the custody of the carrier, he accepted the draft for defendants and by their authority, and the paper was received for and used by them, they would be liable; if he accepted the draft for them, but had not authority from them for doing so, they would not be liable unless they subsequently, with a full knowledge of the facts, ratified his act.

The motion was overruled, and defendants excepted upon each of the grounds aforesaid.

D. F. and W. R. HAMMOND, for plaintiffs in error.

P. L. MYNATT, for defendants.

TRIPPE, Judge.

1. It is a well recognized principle that if A, for a valuable consideration, agree to pay the debt of B to C, and C accepts the promise of A for said debt, A is bound by the promise. If A give his note on such an undertaking, there is sufficient

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consideration to support the contract. And more particularly would this be so if A himself were, as the consideration of his promise, to accept and appropriate to his own use whatever the consideration was of B's debt to C. In this case, according to Scrugg's testimony, he had bought the paper, the draft was drawn on him; the partnership agreed to take the paper, did take it and use it, and by the authority of the partners, he accepted the draft for them, he being one of the firm. The creditors have received the draft so accepted, and ratified the arrangement by bringing suit on it. It is a general principle that there can be no acceptance except by a drawee, or by a drawee *au besoin*, or by some one for honor, so as to make the party liable technically as acceptor: 1 Parson's Notes and Bills, 313; Jackson vs. Hudson, 2 Camp., 447. But it is also a rule, stated by the same authorities, that when there is an acceptance by a third person for a consideration he is liable as a guarantor, or otherwise, on his contract. In this case there was one count against defendants as acceptors, one as guarantors, and one for goods sold and delivered.

2. It is argued for plaintiffs in error that the acceptance is by Scruggs, for the "Opinion newspaper," and that such was not the name or style of the partnership or association. The whole and sole business of the association or partnership was the publication of a newspaper called "The Opinion;" the debt was created for paper, on which "The Opinion" was published, and by a partner in the publication. Was not this a sufficient identification of the partnership. In Faith vs. Richmond *et al.*, 11 A. & E., 339, it was held that when a partner, accustomed to issue notes on behalf of the firm, indorses a particular note in a name differing from that of the partnership and not previously used by them, which note is objected to on that account, in an action brought upon it by the indorsee, the proper question for the jury is whether the name used, though inaccurate, substantially describes the firm, or whether it so far varies that the *indorser must be taken to have issued the note on his own account*, and not in the exercise of his general authority as partner." It is true, as a gen-

eral rule, that a partner has no implied authority to bind his co-partners by his acceptance of a bill of exchange, except by an acceptance in the true style of the partnership: *Kirk vs. Blurton and Habershon*, 9 M. and W., 284; 1 B. and C., 146; *Parson on Notes and Bills*, 135. But in these and like cases there was no evidence that there was a valuable consideration for the acceptance received and accepted by the partnership. In such instances, where the consideration exists, there is no reason or justice in the application of the strict rule. If the firm does in fact receive the consideration, there can be no fraud on the part of the partner thus accepting, as was set up in *Kirk vs. Blurton*, etc., above referred to; and DENMAN, Chief Justice, said, in *Faith vs. Richmond et al.*, *supra*, "In this case Richmond had authority to make notes as a partner in the company; but the note in question described a different firm; and the question was whether the evidence raised any exception to the general rule as to the exercise of a partner's authority," and further specially mentioned the fact that, "the note was made payable at a place where they (the firm) never kept money." What stronger ground for an exception to the general rule could be laid, than in the fact that a firm gets the whole consideration for which the acceptance is given. *Mason vs. Rumsey & Rumsey*, 1 Camp, 384, shows that the general rule does not strictly apply in all cases, and that wherever the reason for it does not exist the rule does not apply. The bill was drawn on "Rumsey & Company," and T. Rumsey, Jr., wrote on it, "accepted. T. Rumsey, Sr.," a partnership between the two Rumseys was proven, and it was held that the acceptance bound the firm. And we think, in this case, if the testimony of Scruggs be true, and the jury so found, the association or partnership was bound on this acceptance.

3. Though the evidence was conflicting on some of the material questions, yet that was a matter for the jury, and there being positive evidence to support the verdict, and the Judge trying the case having refused a new trial, we cannot interfere. The case is not one where the weight of the evidence is so

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strongly against the verdict as to suggest that it was the result of improper or illegal influences or motives.

Judgment affirmed.

COLUMBUS IRON WORKS COMPANY, plaintiff in error, vs. R.
R. GOETCHIUS *et al.*, defendants in error.

A mechanic's lien on personalty was foreclosed under the provisions of the Code applicable to steamboat liens :

Held, That it was error in the Court to allow third persons to move to quash the execution, without its having been made to appear to the Court judicially, by affidavit or otherwise, that such persons were creditors of the defendant. The foundation of their right to contest the execution must be laid by an affidavit, as the Code requires, of the grounds of their denial of the validity of the plaintiff's execution. (R.)

Mechanic's lien. Steamboat lien. Practice. Before Judge JOHNSON. Muscogee Superior Court. October Term, 1872.

For the fact of this case, see the decision.

PEABODY & BRANNON, for plaintiff in error.

H. L. BENNING ; R. J. MOSES, for defendant.

WARNER, Chief Justice.

The plaintiff foreclosed a mechanic's lien on personal property, under the provisions of the 1968th and 1969th sections of the Code, obtained an execution, which was levied on a steam engine, and other personal property of the defendant. On this statement of facts, so far as the record discloses them, Fountain, executor, and Goetchius, who assumed to be creditors of the defendant, made a motion to quash the plaintiff's execution on the following grounds : First, because the lien is not foreclosed as in case of steamboat liens. Second, the amount claimed to be due, is not due. Third, that the \$1,300

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of the money is for sale of an engine; and fourth, there was no demand. The Court sustained the motion and quashed the plaintiff's execution, to which the plaintiff excepted. The lien claimed by the plaintiff was foreclosed as in case of steamboat liens, as appears in the record. The amount claimed, \$1,870 26, is sworn to be due, and a demand of payment and refusal is also alleged, and the claim appears to have been prosecuted within one year after the debt became due. This was an execution issued under the steamboat lien law, and the 1970th section of the Code declares, that if the party defendant in such execution, or any creditor of such defendant contests the amount, or justice of the claim, or the existence of such lien, he may file his affidavit of the fact, setting forth the grounds of such denial, which affidavit shall form an issue, to be returned to the Court and tried as other causes. The property levied on had not been sold, there was no fund in Court to be distributed arising from the sale of the defendant's property, and it was not made *judicially* to appear to the Court, by affidavit or otherwise, that Fountain, executor, and Goetchius were creditors of the defendant, or what was the character of their claim, so far as the record informs us. In other words, they did not lay the foundation of their right to contest the plaintiff's execution by making an affidavit, as the Code requires, of the grounds of their denial of the validity of the plaintiff's execution for the enforcement of his lien. Whether the plaintiff can enforce a mechanic's lien, under the provisions of the steamboat law, on personal property, we express no opinion; it will be time enough to do that when that question shall be raised and brought before the Court in the manner prescribed by the Code.

Let the judgment of the Court below be reversed.

Hambrick vs. Dickey et al.

THOMAS HAMBRICK, plaintiff in error, *vs.* JOHN DICKEY *et al.*, defendants in error.

In 1860 A bought of B a tract of land near which he had lived for some years, paying part of the purchase money, giving his note for the remainder, and going into possession and into the use of the land, and in 1867 permitted judgment to go against him for the balance of the purchase money ; and in 1872 filed a bill in equity, setting up that A, at the time of the original sale, had falsely represented that a certain portion of the land, which was low ground, had been ditched and was then in cultivation, was capable of being kept dry and fit for cultivation, when, in fact, as experience had proved, this was not possible, as after a few years it had become unfit for use, and so continued. The bill set up that B was insolvent, and prayed that the execution which the bill claimed was for no more than the damage caused by the false statements of B might be enjoined :

Held, That the Judge did not err in refusing a temporary injunction and in dismissing the bill for want of equity.

Injunction. Judgment. Misrepresentation. Before Judge GREENE. Henry county. At Chambers. December 4th, 1872.

Thomas Hambrick filed his bill against John Dickey and Richard H. Hightower, deputy sheriff of Henry county, containing substantially the following allegations: On December 21st, 1860, complainant purchased from Dickey a tract of land in Henry county, for \$4,000 00, one-half to be paid in a few days, and the balance on December 25th, 1861. Dickey represented to him, as an inducement to make said purchase, that fifty acres of the tract consisted of exceedingly rich and productive bottom land ; that the bottom land was dry, and that the stream of water, known as Cotton Indian, had a sufficient fall in its bed to keep said land free from water. The balance of the land purchased was poor, and much worn by cultivation. The representations as to the bottom land constituted the inducement to the purchase. Under these circumstances complainant paid half of the purchase money, received a deed from the vendor and went into possession of the land. He has endeavored to cultivate said land in different ways,

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has had the ditches deepened, but has failed to make it remunerative on account of its being continually overflowed by water. Complainant was slow to believe that Dickey had perpetrated so great a fraud upon him, and consequently struggled on, experimenting in every way to render the land adaptable to cultivation, but has at length been driven to the conclusion that said Dickey knowingly and intentionally deceived him. Dickey recovered a judgment against complainant at the February term, 1867, of Henry County Court for the balance of said purchase money, has had the execution issuing therefrom levied by the deputy sheriff upon said land, and it is now advertised for sale. Dickey is insolvent, and unable to respond in damages. Complainant has only fully discovered since the rendition of said judgment the fraud perpetrated upon him. Prayer, that proceedings under the aforesaid execution be enjoined until the further order of the Court; that the aforesaid sale be decreed to be set aside, the deed delivered up, and defendant, Dickey, be directed to pay to complainant that portion of the purchase money already received by him; that the writ of subpoena may issue.

After argument, and hearing the answer and affidavits presented, unnecessary here to be set forth, the Chancellor refused the injunction and dismissed the bill for want of equity, to which ruling complainant excepted.

SPEER & STEWART, by PEEPLES & HOWELL, for plaintiff in error.

J. J. FLOYD; J. R. NOLAN, for defendants.

McCAY, Judge.

We see nothing in the statements of this bill to justify the interference of a Court of equity. We doubt if the complainant has even set forth a case that would have justified an action within four years after the statements were made. The statements of how completely the swamp could be dried—the fall of the stream, etc., are, in the main, mere matters of opinion. He was acquainted with the land, he examined it and

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had as good an opportunity of forming an opinion as the defendant had. Indeed, the whole mistake seems to have been in not knowing the natural truth testified to by the affidavits, to-wit: that however promising such land may appear for a year or two, before the roots, tufts, etc., have rotted, yet when that occurs, the surface is several inches lower than it was whilst they were there. But the complainant has, by his delay, lost his right, if he had any. His right, if he had any, is a cause of action for the deceit. He has allowed thirteen years to elapse. He has kept the land all that time, has allowed a judgment to go for the debt, and kept still several years after that. To permit him to revive his complaint and to set it up now, would, in our judgment, be trifling with justice.

Judgment affirmed.

J. T. WILLINGHAM *et al.*, plaintiffs in error, *vs.* LYDIA SMITH, defendant in error.

1. It was not error in the Court to rule out as evidence an answer of a witness taken by interrogatories as follows: "But knows that the general report was that G. K. Smith owned it, (a store house,) and had used it for several years"—nothing else appearing in the answer to show that the "report" did not apply to the using as well as the ownership.
 2. George K. Smith executed a deed to George Hamilton, and afterwards died. Hamilton conveyed the property by deed, after Smith's death, to his widow. The property was levied on as Smith's property, after his death, and sold by the sheriff, by virtue of an execution issued against Smith in his lifetime, and bought by Willingham, who went into possession. Mrs. Smith brought ejectment. The issue was made by the defendant, Willingham, that Smith's deed to Hamilton, who was his father-in-law, was fraudulent and void. One badge of fraud alleged was continued possession of the property in Smith after making the deed to Hamilton:
- Held*, That Mrs. Smith, not being a party to the cause of action, the other party to which was dead, nor the administrator or executor of George K. Smith being a party to the suit pending, she was a competent witness for herself on the trial of the ejectment.

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3. Where possession in the vendor after the sale was claimed as a badge of fraud, it was competent for a witness to testify that she heard the vendee some time after the sale say to the vendor, "he might have possession of the house free of rent if he would pay taxes and keep up repairs." Although no reply was proven to have been made to the proposition, the fact that the vendor did continue in possession for several years, entitled the party offering the evidence to have it to go to the jury for what it was worth.
4. The entries on the sheriff's docket, (the sheriff being dead,) showing the payment of an execution by the security, are admissible in evidence, it being made to appear that the original executions were lost and the record of the judgment being produced.
5. There was no evidence in this case to authorize the Court to give in charge the request as to the deed being a mortgage.
6. Two verdicts having been rendered for the plaintiff, and there being evidence on which this verdict could have been found, we will not interfere with the refusal of the Court below to grant a new trial.

Ejectment. Evidence. Witness. Fraud. Payment. Charge of Court. New trial. Before Judge HOPKINS. DeKalb Superior Court. September Term, 1872.

Lydia Smith brought ejectment against J. T. Willingham and Hamilton & Russell for the "Red Store lot" in the town of Stone Mountain. The record fails to disclose the defendant's plea.

The evidence made the following case: On the 22d of May, 1851, George K. Smith, the husband of the plaintiff, conveyed the premises in dispute to George K. Hamilton, her father, in consideration of the payment by the latter of certain debts due by the former.

On April 2d, 1866, George K. Hamilton conveyed said lot to the plaintiff.

At the time the deed was executed by Smith to Hamilton, the former was in failing circumstances, but probably had sufficient property to pay his debts. On October 28th, 1862, Kinchen Jenkins obtained a judgment against Smith & Eihudge, of which firm George K. Smith was a partner, for the sum of \$401 42, principal, besides interest and costs. On the first Tuesday in February, 1869, the property in controversy was sold under the execution based upon the aforesaid

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judgment, to J. T. Willingham, and a sheriff's deed was made accordingly. Before the sale Hamilton handed to the sheriff papers claiming the property for the plaintiff. He did not regard them, as he did not think the securities good. No notice of this fact was given to the plaintiff or to Hamilton. The latter was present at the sale, the former was not. The property brought \$505 00, which amount was paid to executions against Smith. After the deed was executed by Smith to Hamilton, the former remained in possession of the property and controlled it as his own. The plaintiff testified that she purchased the lot from her father, in good faith, without notice of any fraud (if there was any,) in the sale from Smith to Hamilton, and paid the full consideration mentioned in the deed.

The jury returned a verdict for the plaintiff. The defendants moved for a new trial upon the following grounds, to-wit :

1st. Because the Court erred in ruling out the following portion of an answer of Kinchen Jenkins, a witness for the defendant, made to the first cross-interrogatory, "but knew that the general report was that George K. Smith owned it, (the lot in dispute,) and had used it several years."

2d. Because the Court erred in allowing the plaintiff to testify in her own behalf, her husband, George K. Smith, the maker of the deed to Hamilton, being dead.

3d. Because the Court erred in admitting, over the objection of defendant, the evidence of the plaintiff, as follows: "Some time after the making of the deed, she heard her father, George K. Hamilton, tell her husband that he might have possession of the property in dispute, free of rent, if he would pay the taxes and keep it in repair."

4th. Because the Court erred in allowing the plaintiff, over the objection of the defendant, to read to the jury as evidence the entries in the sheriff's docket, showing the receipt of money on three executions against Smith, paid by George K. Hamilton to S. P. Wright, the then deputy sheriff, it ap-

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pearing that said sheriff was dead, and the record of writs showing the judgments having been produced.

5th. Because the Court erred in refusing to charge the jury as follows: "If you believe from the evidence that the deed from Smith to Hamilton, notwithstanding it may appear to be an absolute deed, was only intended to secure Hamilton against loss by his paying the debts of Smith, and that the debts were paid out of the proceeds of the property conveyed, then such deed would be a mortgage, and would not vest the title to the property in Hamilton, but would leave the title in Smith."

6th. Because the verdict was contrary to the law and the evidence.

The motion was overruled, and the defendants excepted upon each of the grounds aforesaid.

HILL & CANDLER, for plaintiffs in error.

A. W. HAMMOND & SON; T. P. WESTMORELAND, for the defendant.

TRIPPE, Judge.

1. Upon the face of the answer, it appears that the "report" the witness referred to applied to both the ownership and the possession or use of the store house. It certainly was not competent evidence to prove title by report, nor, indeed, was report admissible to prove the use of the house by the defendant in the execution. Besides, the use of this house by George K. Smith was proved by other and legal evidence, and that fact was not disputed.

2. Section 3798 of the Code excludes a party as a witness for himself, where one of the original parties to the contract or cause of action in issue or on trial is dead, or where an executor or administrator is a party in any suit on a contract of his testator or intestate. It is not pretended that this case falls within the latter clause of this section. Nor can it be properly said that the spirit and meaning of the first clause require

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that Mrs. Smith should be held incompetent as a witness, when her testimony does not seek to impose any burden or liability on her husband's estate. That estate can have no possible interest in the result of this suit. It is a contest between Mrs. Smith and a purchaser of the property under an execution against her husband. The judgment can charge nothing—not even cost on the deceased maker of the deed to Hamilton, nor can it benefit him. The testimony seeks to set up nothing against his act, character or estate, which he, being dead, cannot controvert. And, after all, is not that fact a good test to determine the proper construction of the words of the section quoted, in ascertaining who were intended to come within those exceptions? See *Johnson vs. McCombs*, decided at this term.

3. It was objected that the testimony as to what Dr. Hamilton said to Smith, to-wit: that “he might have possession of the house, free of rent, if he would pay the taxes and keep up repairs,” was not competent, because no reply of Smith was proven. But it was in proof that Smith did keep possession after the proposition was made, and as the plaintiff claimed that such possession was a badge of fraud, it was proper that the evidence should go to the jury for what it was worth.

4. The fourth clause of section 397 of the Code requires sheriffs “to keep an execution docket, wherein they must enter a full description of all executions delivered to them, * * * together with all their acts and doings thereon, and have the same ready for use in any Court of their county;” and section 398 requires these books, after becoming full, to be deposited in the clerk's office, “to be kept as their other books of record.” It was made to appear that the original executions were lost; that the sheriff who made the entries was dead, and the record of the judgment on which the executions issued was produced. This made the books thus kept, as required by law, the next best evidence in this case. Certainly they were competent, when no other proof could be had.

5. We do not think there was any evidence to justify the Court in giving in charge the request made by defendant's

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counsel, as to the deed being a mortgage. There was nothing that would have authorized the jury so to find. There have been two verdicts for the plaintiff; the Court refused to disturb this verdict, and we do not feel justified in controlling his discretion, under the evidence in this case.

Judgment affirmed.

SIMON COGAN, plaintiff in error, *vs.* NATHAN G. CHRISTIE
et al., defendants in error.

1. If C was in possession of land at the time S purchased it, that fact was at least constructive notice to the purchaser, and was sufficient to have put him upon inquiry as to the character and extent of C's claim. (R.)
2. Where the evidence leaves it in some doubt whether a fact necessary to sustain the verdict was established, the Supreme Court will not control the discretion of the Superior Court in awarding a new trial. (R.)

Possession. Notice. New trial. Before Judge HARRELL.
Terrell Superior Court. May Term, 1872.

Simon Cogan filed his bill against Nathan G. Christie, Seaborn A. Smith, and William Pemberton and Richard L. Brown, as executors of William B. Jones, for the purpose of canceling two deeds to the "Cogan Mill Place," one from Christie to Smith, dated November 1st, 1859, and one from Smith to Jones, dated August 4th, 1863. (The record also fixes this year as 1867.) The bill further prayed that Christie might be required to specifically perform his contract contained in a bond for titles, in which he obligated himself to convey said property to complainant.

For the remaining facts, see the decision.

C. B. WOOTEN; R. F. SIMMONS, for plaintiff in error.

Cogan vs. Christie et al.

F. M. HARPER, by CLARK & GOSS; ARTHUR HOOD, for defendants.

WARNER, Chief Justice.

1. The error complained of in this case is the granting of a new trial by the Court below. The main facts of the case are as follows: Cogan and Jordan purchased a tract of land with a mill thereon from Christie, who executed to them his bond to make a title thereto when the purchase money therefor should be paid. Cogan went into possession of the land and alleges he has paid all the purchase money, that Jordan relinquished all his interest in the land to him. The evidence in the record upon this part of the case is somewhat conflicting. It appears, however, that Christie, after he had sold the land to Cogan and Jordan, sold it to Smith, and made him a deed, dated 1st November, 1859. Smith sold the land to Jones, and made him a deed, dated 4th August, 1863. On the trial of the case the Court charged the jury that Cogan acquired no title to the land under his bond for title unless all the purchase money was paid, and even if it was all paid, Christie having made a deed to Smith, conveying the land in dispute, the plaintiff was not entitled to recover unless the proof showed that Smith had notice of that fact at the time of his purchase, and the mere fact of Cogan being in possession of the land was not sufficient notice to Smith. The jury found a verdict in favor of Cogan. Whether the Court granted the new trial because the jury found contrary to the charge of the Court, or because the verdict was contrary to the evidence, does not appear in the record. If Cogan was in possession of the land at the time Smith purchased it from Christie, that fact was constructive notice to Smith, at least, and sufficient to have put him upon inquiry as to the character and extent of Cogan's claim of title to an interest in the land, and the charge of the Court was error in regard to that point in the case.

2. In view of the evidence contained in the record, and as

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there is some doubt under that evidence whether Cogan was in possession of the land at the time of the date of Smith's deed, we will not interfere with the judgment of the Court below in granting the new trial.

Judgment affirmed.

ALSON THOMAS, plaintiff in error, vs. JOHN J. WHITEHEAD, administrator, defendant in error.

When, in a pending suit between A and the administrator of A's deceased father-in-law, in relation to certain money loaned by the son-in-law to the deceased, and two other of the deceased's children testified of a settlement between the parties, giving the details of it, and, in answer to cross-interrogatories, said that they were not present, and that all they knew of it they got from family conversations, the witness not recollecting that A was present at any of said conversations, but giving his opinion that he was:

Held, That it was error to permit the answers as to the asserted settlement to be read as evidence to the jury.

Evidence. Settlement. Before Judge HARVEY. Floyd Superior Court. January Term, 1872.

Thomas brought assumpsit against Whitehead, as administrator of John C. Whitehead, deceased, alleging, in his declaration, that on November 1st, 1854, he loaned to said intestate \$450 00, taking a bond therefor bearing interest from date; that on the 1st of July, 1858, there was paid on said obligation \$100 00; that on the day and year last aforesaid, said intestate, in consideration of the surrender to him of said bond, undertook and faithfully promised to plaintiff that he would make good to plaintiff the amount due on said bond in the final division of his estate, plaintiff being his son-in-law; that, in consideration of said promise, plaintiff surrendered said bond; that said intestate, during his life, and his administrator, since his death, have failed to comply with said undertaking.

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The defendant pleaded the general issue, payment, and the statute of limitations.

The plaintiff sustained the allegations of his declaration by the evidence of his wife, the daughter of the intestate.

The defendant introduced the depositions of Mrs. Martha A. Booze, a daughter of the intestate, and of her husband, Thomas Booze, who, in answer to direct interrogatories, testified as to the details of a settlement between plaintiff and the intestate, by which said bond was paid off in full when it was surrendered. But, on cross-examination, these witnesses testified that all their information on the subject of the settlement was derived from "family conversations," and were unable to recollect whether the plaintiff was present at such conversations or not.

This evidence was objected to by the plaintiff, and the objection overruled.

As to this testimony, the Court charged the jury as follows: "I have admitted this testimony, but I charge you that unless you shall believe from the evidence that the plaintiff was present at such conversations, and assented to what was said, the testimony is not legal and you cannot consider it. But if you shall believe from the evidence that the plaintiff was present and assenting, then the evidence is legal, and you can consider it with the balance of the evidence in the case."

The jury returned a verdict for the defendant. The plaintiff moved for a new trial, upon the ground that the Court erred in the aforesaid admission of testimony.

The motion was overruled and the plaintiff excepted.

WRIGHT & FEATHERSTON, for plaintiff in error.

ALEXANDER & WRIGHT, for defendant.

McCAY, Judge.

Both these witnesses, though they go into detail as to the settlement, and speak very decidedly in their narration of facts, yet at last say they were, neither of them, present at the

settlement, and know nothing about it except as they learned it from "family conversations." One of the witnesses states specifically that he does *not* know the plaintiff was present at these conversations, but he *must* have been. We do not think these "family" conversations, as testified to, are anything but hearsay. They were incompetent testimony. At best, testimony of this sort, to-wit: statements made in the hearing of one, which he does not contradict, are only evidence against him, in certain circumstances. They must be of a character that calls for a reply. It does not here even appear that there was any reply, nor are any of the surroundings given so as to enable us to judge whether a reply was called for. These conversations have no weight at all, as conversations, to give them any weight. They must be proven to have occurred under such circumstances as to give them the character of *admissions by the plaintiff*.

We think the facts stated by the witnesses utterly fail to show such circumstances. They do not show the plaintiff present, nor do they show the circumstances under which the conversations were had, and it is impossible to come to a conclusion that they are of the nature of admissions by the plaintiff. Above all, it does not appear that he did not deny them or make entirely different statements. Proof of his presence, and proof that the conversations were had, under such circumstances as make the inference a fair one, that the plaintiff, by failing to contradict or modify them, admitted them, is indispensable. Until this be done, such conversations are but hearsay, and the Court should not let them go to the jury.

Judgment reversed.

ELIZABETH A. MANES, plaintiff in error, vs. JAMES W. SLATER et al., defendants in error.

Plaintiffs in ejectment introduced in evidence a deed for the premises in dispute, from Samuel Slater to Ann Slater during her life, with remainder to her children by William Slater, and proved the death of

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their mother, Ann Slater. The deed bears date January 1st, 1849. Defendant introduced a deed dated December 4th, 1849, to the same premises, from Ann Slater and William Slater, her husband, to Elmore Manes, and one from the representatives of Manes to Waters, with a transfer of the last deed to defendant. It was not in evidence that Samuel Slater was ever in possession of the premises, nor had any title in him, nor that Ann Slater ever accepted the deed from him, or that she and her husband held under him, or recognized the title as ever being in him, nor that the deed was ever in the possession of Ann Slater, or of any one under whom defendant claims:

Held, That the evidence does not show a common *propositus* under whom both plaintiffs and defendant claim, and that no title is shown in the plaintiffs to entitle them to recovery.

Ejectment. Title. Before Judge SCHLEY. Bulloch Superior Court. October Term, 1871.

James W. Slater, Daniel G. Slater and Lavinia Slater brought complaint against Elizabeth A. Manes, for a tract of land containing three hundred and twenty-five acres, more or less, situate in the county of Bulloch, known as the "Beaver Pond tract." The defendant pleaded the general issue, the statute of limitations and title by prescription.

Upon the trial the plaintiffs introduced the following evidence:

1st. Deed from Samuel Slater, executed on January 1st, 1849, conveying the premises in dispute to Ann Slater for and during her natural life, with remainder to the children she may have by her husband, William Slater.

2d. James W. Slater, one of the plaintiffs, testified that plaintiffs are the children of William and Ann Slater, who have both been dead for some ten years.

Plaintiff's closed. The defendant introduced the following evidence:

1st. Deed from William and Ann Slater, dated December 4th, 1849, conveying the premises in controversy to Elmore Manes.

2d. Deed from the administrator and administratrix of Elmore Manes, dated October 5th, 1858, conveying the said land to Erastus Waters.

3d. Transfer of the deed last aforesaid by Waters to defendant, of same date with the deed.

4th. B. J. Sims testified that Elmore Manes, the husband of defendant, went into possession of the property in dispute more than seventeen years ago, and defendant has been in possession from the date of the transfer of the deed by Erastus Waters to her, up to the present time.

The jury found for the defendant. A motion was made for a new trial because the verdict was contrary to the law and the evidence. The motion was sustained and a new trial ordered. Whereupon, the defendant excepted, and now assigns said ruling as error.

RUFUS E. LESTER; A. H. SMITH, by brief, for plaintiff in error.

JAMES H. HUNTER; H. C. McCALL, by brief, for defendants.

TRIPPE, Judge.

We presume the Court granted the new trial on the principle that "where both plaintiff and defendant in ejectment deduce title from a common source it is not necessary for either party to go beyond that," as was held in *Wood et al., vs. McGuire's children*, 17 Georgia, 303. But here this was not exactly the case. Plaintiffs claim under a deed from Samuel Slater to Ann Slater for life, with remainder to them. Defendant claims under a deed from Ann Slater and her husband, William Slater. No title or possession was ever shown in Samuel Slater, nor was there any evidence that Ann Slater or her husband ever accepted the deed or possession from him, or that the deed from him was ever in her possession, or her husband's, or in the possession of defendant or any one under whom he claims. In fact, the record does not disclose that there was any connection whatever between Samuel Slater and the defendant's title, nor indeed that there was any privity or relationship between Samuel Slater and Ann Slater, except

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what is recited in the deed of Samuel Slater, and that was introduced by plaintiffs.

The plaintiffs certainly did not make a case when they closed, on which they could recover; and though the defendant may not have shown a good title in himself, the only question in the case is, whether he, by the introduction of the deed from Ann and William Slater, sufficiently showed title in Samuel Slater to entitle the plaintiffs to a recovery. That deed produced the only danger to defendant, so far as the record discloses. Keep it out, and the battle was won. We cannot tell what the facts are, outside of the record, but nothing stated in it would authorize a recovery by plaintiffs, even with that deed in evidence. Had the plaintiffs have gone one step farther and proved that Ann and William Slater did hold or claim under this deed of Samuel Slater, the result might have been different.

Judgment reversed.

WILLIAM M. PEEPLES, plaintiff in error, *vs.* SIDNEY ROOT,
defendant in error.

The plaintiff may dismiss his case at any time before the verdict is published, if unknown to him. (R.)

Practice. Dismissal of case. Before Judge HARRELL.
Terrell Superior Court. May Term, 1872.

For the facts of this case, see the decision.

LYON & IRVIN; F. M. HARPER, by CLARK & GOSS, for
plaintiff in error.

C. B. WOOTEN, for defendant.

WARNER, Chief Justice.

The error complained of in this case is, that the Court below allowed the plaintiff to dismiss his case after the same had been submitted to the jury, and whilst they had been

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considering the same for some time in their jury room. The right of the plaintiff to dismiss his case was decided by this Court in the *Merchants' Bank of Macon vs. Rawls & Taylor*, 7 *Georgia Reports*, 191; *Hugeley vs. Holstein*, 34 *Georgia Reports*, 572. When the jury came into Court in the case now before us, after the plaintiff's motion to dismiss it, a verdict, it appears, had been agreed on by the jury for the defendant, written and signed by the foreman, but there is no evidence that the fact was known to the plaintiff or his counsel at the time the motion to dismiss the case was made. If it had been shown to the Court by competent evidence that the plaintiff had surreptitiously, or otherwise, ascertained that the jury had found a verdict against him before the motion was made to dismiss the case, and the Court had then refused to dismiss it on that account, we should not have been disposed to interfere with that judgment, but nothing of that kind was made to appear to the Court in this case.

Let the judgment of the Court below be affirmed.

HENRY JONES, administrator, plaintiff in error, vs. THOMAS T. BRANDON, defendant in error.

Under the decision of the Supreme Court of the United States, in the case of *Gunn vs. Barry*, the homestead clause of the Constitution of 1868 is in violation of the Constitution of the United States, in so far as it authorizes the homestead and exemption therein provided for to be set up against contracts made before the adoption of said Constitution of 1868.

Homestead. Before Judge GIBSON. Richmond Superior Court. October Term, 1872.

This case was submitted to the jury upon the following state of facts, subject to direction from the Court:

"That on the 5th of December, 1853, Cornelius A. Red was appointed administrator, with the will annexed, of Green B. Red, and executed a bond for \$50,000 00, payable to the

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Ordinary of Richmond county, with Augustus H. Roe, Lewis Lovell, Frederick R. Shaw and Thomas T. Brandon, as securities.

“That the securities, becoming alarmed, applied to be discharged from their liability, which was granted them—Frederick R. Shaw, May 4th, 1857, Augustus H. Roe, August 3d, 1857, Lewis Lovell, August 3d, 1857, and Thomas T. Brandon, July 5th, 1858.

“On the 5th of July, 1858, Red was also discharged as administrator, upon failing to give additional security, and died July,, 1868, without accounting, as administrator, for property in hand.

“Henry Jones was appointed administrator *de bonis non* of Green B. Red, with the will annexed, and instituted suit against the securities on the bond of C. A. Red, to recover \$3,729 76, amount returned by C. A. Red, as in hand, in money, at the time of his last return, July 6th, 1857. Judgment was rendered against all the securities, June 13th, 1871, for \$3,729 76, the amount in hand of C. A. Red, except Shaw, against whom judgment was rendered for \$1,000 00.

“On the 3d of July, 1871, garnishment process was taken out on this judgment, and a summons served on Alfred W. Shaw, a debtor of Thomas T. Brandon, on a note past maturity.

“On the 4th of August, 1871, Brandon filed his application for homestead, and claimed in addition to the real and personal property therein set forth, a note of Alfred W. Shaw, due to him, to reach which the garnishment proceedings had been taken out, and which was then in the hands of H. C. Foster, Esq., attorney for Brandon, for collection.

“By agreement of counsel, the note was collected by Mr. Foster, and the money held subject to the order of Court, to await the decision on the homestead application and garnishment proceedings; this note, after deducting the counsel fees for collection, leaves on hand the sum of \$634 00.

“It was agreed between counsel that the homestead and

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garnishment question should both be determined in the one issue."

After argument had, the Court ordered a verdict to be taken as follows:

"We, the jury, find for the applicant so far as the realty is concerned, and set aside so much of the note or the proceeds thereof as will make the schedule of personalty aggregate \$1,000 00 in gold, that is \$460 00 in gold be added to personalty. (Signed) JOSEPH T. DAVENPORT, Foreman."

To the ruling of the Court in directing the verdict aforesaid, plaintiff in error excepted.

FRANK H. MILLER, for plaintiff in error.

H. CLAY FOSTER, by BARNES & CUMMING; SAMUEL F. WEBB, for defendant.

McCAY, Judge.

However decided may be my personal protest against the decision of the Supreme Court of the United States in the case of *Gunn vs. Barry*, yet, as that Court, upon questions of this character, is an appellate tribunal, having power under the laws to review and reverse the judgments of this Court, I feel it to be my duty to conform my judgments in other cases turning on the same point to that decision. It is argued that this case differs from *Gunn vs. Barry*—that then there was a judgment—a vested right in *Gunn* before the Constitution of 1868 was adopted, whilst in this case the plaintiff has only his note.

It is true that the decision alluded to does say that the effect of the Constitution of 1868 is to divest a vested right in *Gunn*, but that must be taken as only collateral to the main point. The right of the Supreme Court to pass upon the question at all depends *entirely* upon the supposed antagonism between the homestead law and that clause of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of *contracts*. If our homestead law

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does not do that the Supreme Court has nothing to do with the question. A State may, as that Court has formally held, divest a vested right if it so please. The Constitution of the United States does not at all interfere with its right to do so, provided that right is not vested by contract. It follows, therefore, that if the decision of *Gunn vs. Barry* is right—and we must take it to be so—it is only because the homestead law of Georgia, so far as it relates to debts *contracted* before its passage, impairs the obligation of the *contract* between the parties. That contract was made at the date of the note, and does not depend on the judgment. There is, therefore, nothing in this case to distinguish it from the principle decided in *Gunn vs. Barry*, though it is true that the decision there covers other grounds.

I dissent myself from the opinion of the Court on all the grounds it takes, but as I have said, its judgment upon that ground, which it was authorized to pass on, is controlling, and I feel bound to conform to it in like cases.

Judgment reversed.

JOSEPH S. CLARKE, executor, plaintiff in error, vs. EDWARD W. HARKER, defendant in error.

1. When it is directed in a will that the estate of the testator shall be equally divided between his five children “after deducting a portion off of the shares of William J. and Caroline E.” equal to what had been advanced to them, and it appears from an agreed statement of the facts, that the executor (the only one surviving) came into the possession of a certain lot, in the city of Augusta, as such executor, and as the property of the testator, and that the will had not been executed as to this lot and other property of the estate:

Held, That the interest William J. and Caroline E. may have in said lot is not subject to levy and sale under a judgment and execution obtained against said William J., and the husband of Caroline E., for a debt due from them.

2. In one item of a will executed in 1840, (the testator dying shortly afterwards) property is given to his executors in trust for all the children of testator—including a married daughter, and the husband of such

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daughter being one of the executors—"for their sole and separate use during their natural lives and to remain to their children after their death;" and in the next item of the will two of said executors (omitting the husband,) are appointed trustees for said married daughter, and it is immediately added, "and that her estate be held by them for the sole use and benefit of the heirs of her body:"

Held, That both items will be considered in construing what estate was intended to be given to such daughter, and that an estate in trust for her sole and separate use is thereby created, and is not subject to levy and sale for the debts of her husband.

Administrators and executors. Trusts. Will. Separate estate. Before Judge GIBSON. Richmond Superior Court. October Term, 1872.

An execution in favor of Edward W. Harker against Clarke & Company, composed of Joseph S. Clarke and William J. Mealing, was levied upon "the one-fourth interest each of the said Joseph S. Clark and William J. Mealing in a lot of land on the corner of Greene and Monument streets, in the city of Augusta." The property was claimed by Clarke, as the executor of the last will and testament of Henry Mealing, deceased.

Upon the trial of the issue formed, the following evidence was introduced:

1st. The execution with the levy thereon.

2d. The will of Henry Mealing, deceased, executed on November 21st, 1839, and admitted to probate on January 6th, 1840, the only material portions of which are as follows:

"4th. I desire and request that my two youngest children, Jane Teresa and Henry Lewis, be allowed a sufficient sum out of my estate to raise, board, clothe, and school them, to be equal to those now of age, raised and educated, which is as follows: William J., Caroline E., Mary Ann Mealing; which amount my executors may judge sufficient for them till they become of age, or get married, and the remainder of my estate to be equally divided into five equal shares, 'after deducting a portion off of William J. Mealing and Caroline E. Mealing, part of which they have already received, and converted to their own use and benefit.'

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"6th. My desire and request is that my executors be the guardians of my children now under age: Henry Lewis and Jane Teresa. My further will is that my executors be the trustees of all my children, William J., Caroline E. Clarke, Mary Ann, Henry Lewis and Jane Teresa Mealing, and that the same be always held for their sole and separate use during their natural lives, and to remain to their children after their death. It is my will, that if either of my daughters die without lawful issue, one-half of her estate to revert back to the surviving children, share and share alike: then their trustees may give her or them the testamentary appointment of the other half of her or their estate."

"7th. I request and desire and appoint Benjamin H. Warren and Philip H. Mantz to be the trustees of my daughter, Caroline E. Clarke, and that her estate be held by them for the sole use, benefit, and the heirs of her body."

Also, the following agreed state of facts: "Joseph S. Clarke is the only surviving executor of Mealing's will. That as such executor he came into possession of said lot as the property of the testator, and that the will has not been executed as to this lot, and other property of the estate. The firm of Clarke & Company, composed of Joseph S. Clarke and William Mealing, was formed about 1855, and continued to do a large and profitable business until 1866, when they failed. Since that time, J. S. Clarke has been out of business, but William J. Mealing has been employed, and still is, as the agent of the Georgia Masonic Lottery, from which he derives a comfortable support. W. J. Mealing has never married."

The Court charged the jury that the interest of William J. Mealing in the lot of land levied on was subject to levy and sale, and a verdict was returned accordingly. Clarke, as executor, excepted to said charge, and assigns the same as error.

Harker excepted to said charge, and assigns error upon the following grounds:

1st. Because the Court held that the interest of Caroline E. Clarke, wife of Joseph S. Clarke, under the will of Henry Mealing, did not vest in her husband, Joseph S. Clarke, and

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thereby became subject to the judgment rendered against him in favor of the plaintiff.

2d. Because the Court held that the language of the seventh item of the will of said Henry Mealing, whereby he directed the estate of Caroline E. Clarke to be held by trustees for the sole use, benefit, and the heirs of her body, did not create an estate tail, but was simply an appointment of trustees to carry into effect the trust created by the sixth item of said will.

3d. Because the Court directed the jury to find the interest of Caroline E. Clarke, under said will, not subject to the execution.

CLAIBORNE SNEAD; McLAWS & GANAHL, for plaintiff in error.

FRANK H. MILLER, for defendant.

TRIPPE, Judge.

1. If William J. Mealing has an interest in the lot levied on, unaffected by any claim for deduction on account of the advancement made to him, as provided by the will, could he have that interest, say one-fifth, set apart or assigned to him by any process known to the law, without reference to the "other property of the estate" which has not been administered? He may have an undivided one-fifth in the whole property, this lot included. But if the debts of the estate be all paid, and it may be so presumed after the lapse of over thirty years, could he set up a demand for a partition of his one-fifth interest in any particular part of the unadministered property of the estate? The rights of the other legatees or devisees might require that the whole estate should be sold, or that it should be divided in kind by lot. This particular portion, an interest in which is levied on, might constitute one share to be so assigned, and in the drawing to which the parties may be entitled, it might fall to one of them and not to William J. To allow an undivided interest of a legatee or devisee *in any one portion of the property of an estate* to be sold under a judg-



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ment against such legatee or devisee would defeat, without any fault on the part of the others, the right they have to a distribution in kind. To illustrate this, and the injustice of it: suppose a testator's estate consists of five lots of land, four of them appraised at \$500 00 each, and one at \$400 00. He bequeaths them to his five children. The value of the interest of each child is \$480 00. The children, and each of them, are entitled to have a partition, or a division in kind. The commissioners could, and probably would, make five divisions of the land, and counting one lot, say number one, at \$400 00, make each other share or lot pay number one \$20 00, and thus make all equal, by a distribution in kind. Each devisee is entitled to have such a division, unless it be held, on investigation, to work injustice or damage, and in the case given it would be simple, cheap and just. Now, if a judgment creditor of one of the children could levy on and sell his interest, say one-fifth, in one of the lots, it would operate so as to fix that portion or interest in *that particular lot* in the purchaser at the sheriff's sale, and thus defeat such a distribution, or so encumber and complicate it as to seriously affect the rights of all the other devisees.

2. It is not denied that where one part of a will is in conflict with another part, the last provision is to prevail. This is so, when the conflict is such, that by no fair or reasonable construction, both provisions can stand. There is no such conflict in the two items in this will, so far as concerns the estate created in Mrs. Clarke. The last of the two items does limit the trustees to two of the executors, and it thereby abrogates that part of the preceding item which includes the husband as one of the trustees. But it cannot be seriously doubted, that taking the two together, an estate in trust was created for the sole and separate use of Mrs. Clarke, an estate not liable for the debts of her husband. It is not necessary to decide whether the children of Mrs. Clarke take as purchasers, or whether an inheritable estate vested in her. The children are not parties to the cause and no judgment would bind them. I refer to *Dudley et al. vs. Porter*, 16

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Georgia, 614, as illustrative of the principle, that words in a latter clause of an instrument—a deed—may serve to explain and modify those used in a former clause. In that case, under the rule, “that where in a deed, two clauses are in irreconcilable contradiction, the first shall prevail.” The Court below held that the words in the first part of the deed imported an intention to create an estate tail, and thereby vested a fee simple in the donee, Maria Dudley, while the latter gave her only a life estate; and as the two were thus repugnant the first must prevail. But this Court, on reviewing the case, held that the whole was to be taken together in construing the intention of the grantor in the use of the words in the first clause, that the latter clause might be explanatory of, and not repugnant to, the former, and decided that though the words used in the first clause created an estate tail, etc., yet, by reason of the words in the latter clause, the former were construed to convey only a life estate. If a subsequent clause in a deed may thus aid in the construction of a preceding clause, with equal reason may one item in a will assist in ascertaining the meaning of a testator in a subsequent provision in the same will, on the same subject matter as is provided for in that first item.

Judgment reversed.

PARK & IVERSON, plaintiffs in error, vs. THE PIEDMONT AND ARLINGTON LIFE INSURANCE COMPANY, defendant in error.

1. When parties make an express contract which is plain, evidence of usage and custom is inadmissible to control, vary or contradict it. (R.)
2. Where, during the trial of a case, it becomes necessary to prove the general custom in the life insurance business as to the commutation of renewals in favor of discharged agents, the proper question would be, “What is the general or universal usage and custom in the life insurance business as to the commutation of renewals,” etc.? (R.)

Park & Iverson vs. The Piedmont, etc., Company.

Assumpsit. Insurance agents. Custom. Examination of witness. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1872.

The Piedmont and Arlington Life Insurance Company brought assumpsit against Park & Iverson for \$5,000 00, alleged to have been collected by them as the agents of said company at Columbus, Georgia, from January 1st, 1868, to January 1st, 1871, for which they had failed to account. The defendants pleaded the general issue, payment, and set-off of \$2,500 00 alleged to be due to them for commutation of renewal premiums, on policies obtained by them, after their discharge as plaintiff's agents.

Upon the trial, the plaintiff read in evidence a portion of an answer by the defendants to a bill filed by the plaintiff against them, in which was set forth the following account as correct:

"Amount received from first payments.	\$4,595 12
Amount received from renewals.....	4,931 89
	<hr/>
	\$9,527 01
CR.	
Commissions	\$1,757 37
Expenses of agency.....	448 00
Cash remitted.....	5,334 84
	<hr/>
	7,540 21
	<hr/>
Due company.....	\$1,986 80."

The answer also contained the following admission, to-wit: "Their compensation for services, fixed by contract with the complainant, was twenty per cent. of and upon all sums collected for first year's insurance, and seven and one-half per cent. of and upon all sums received by them for continued renewals of policies—that is, yearly renewals of policies issued through these defendants as agents as aforesaid."

Plaintiff closed.

John F. Iverson, one of the defendants, testified, that in April 1869, the plaintiff employed the defendants as agents

in the life insurance business, under a contract to pay twenty per cent. on policies issued by said company on applications made through the defendants, and seven and one-half per cent. on renewals on said policies; that in said contract, nothing was said about the interest of defendants in renewals made on said policies after the discharge of defendants. The following questions were then propounded successively to the witness, and upon objection made by counsel for plaintiff, the objection was sustained, and exception on the part of defendants noted.

1st. "Whether he knew of any custom in the life insurance business as to the commutation of the value of renewals on discharging agents?"

2d. "Whether he knew of any custom of the plaintiff in the life insurance business to allow discharged agents the commuted value of renewals?"

3d. "Whether he knew of any usage in the life insurance business as to the commutation of the value of renewals on the discharge of agents, and what such usage was, if there was any?"

4th. "Whether he knew of any usage of plaintiffs in their life insurance business as to the commuting the value of renewals on discharging agents?"

5th. "What was the usual and customary commissions received by agents in the life insurance business?"

6th. "What the services of Park & Iverson as agents of the Piedmont & Arlington Life Insurance Company were reasonably worth?"

7th. "Why were the defendants discharged?"

The witness further testified that the plaintiff had sent one Meade to settle with them and to discontinue the agency; that on or about the 27th of January the defendants paid to Meade \$356 00, and were to have a full settlement on the next day; that on the succeeding day they required Meade to allow them the commuted value of renewals, and on his stating that he had no authority to take such a course, the defendants declined to settle; that on the succeeding day they were discharged. That the rates of commissions were fixed by cor-

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respondence. That the value of the renewals was about \$2,500 00.

Hampton S. Park, the other defendant, testified substantially as Iverson. The same questions were proposed to be asked him as were propounded to the preceding witness, and on objection made, were excluded by the Court.

Other evidence was introduced, not material to an understanding of the decision of the Court.

The charge of the Court was as follows, to-wit:

“The defendants alleged that there was a special contract between them and the plaintiff, and so the plaintiff admitted. The plaintiff alleged that the special contract was that the defendants were to have twenty per cent. on the first year’s insurance and seven and one half per cent. while the policies existed. The defendants, on the other hand, contended that the contract was that they were to have twenty per cent. on the first year’s insurance and seven and one half per cent on renewals of policies while they existed, and a commutation value in case they were discharged. This is a question for the consideration of the jury, and for the purpose of determining it they would look to the whole evidence, and if upon consideration of it they should be of opinion that the contract was as alleged by defendants, the defendants, if they had been discharged, would be entitled to have and receive a commuted value.

“If, at the time suit was commenced, the plaintiff was indebted to the defendants, they should find for the defendants, but if the defendants were indebted to the plaintiff, then they should find for the plaintiff.”

To which charge the defendants excepted. The defendants requested the Court to charge the jury as follows: “If the defendants were appointed agents of the plaintiff under a contract between the plaintiff and defendants, that they, the defendants, were to receive twenty per centum commissions on all policies issued by the company to persons who applied for said policies through said defendants, as agents, and seven and one-half per centum on renewals of said policies, and nothing was said in said contract limiting the interest of said

defendants in said renewals to the time said defendants continued to act as agents, and if it further appears that plaintiff has discontinued defendants as agents, defendants do not thereby lose their interest in the renewals."

The Court refused to charge as requested, and the defendants excepted.

The jury returned a verdict for the plaintiff for \$1,986 80, with interest from March 1st, 1871.

The defendants assign error upon each of the aforesaid grounds of exception.

R. J. MOSES; M. H. BLANDFORD; L. T. DOWNING, for plaintiffs in error.

INGRAM & CRAWFORD, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendants to recover a sum of money alleged to have been received by them as agents of the plaintiff, in the life insurance business. On the trial of the case, the jury found a verdict for the plaintiff. The main question in issue between the parties at the trial, was whether the defendants should be allowed their set-off to the plaintiff's demand and for commutation of renewed premiums on policies obtained by them after their discharge as plaintiff's agents. The plaintiff proved by the sworn answer of the defendants that the contract between them and the plaintiff was, that the compensation for their services was to be twenty per centum of and upon all sums collected for first year's premium insurance, and seven and one-half per centum of and upon all sums *received by them*, for continued renewals of policies. On the trial, one of the defendants was sworn as a witness in his own behalf, and the question was propounded to him, "Whether he knew of any custom or usage in the life insurance business as to the commutation of the value of renewals on discharging agents?" Objection being made to the question by the plaintiff, the Court sustained the objection, and the defendants excepted.

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The defendant's counsel also asked the witness if he knew of any usage in the life insurance business as to the commutation of value of renewals on the discharge of agents, and what such usage was, if there was any? which being objected, to, the Court sustained the objection, and defendants excepted.

The contract of the parties in this case was, that the defendants should receive for their services twenty per centum on all sums collected by them for first year's premium insurance, and seven and one-half per centum on all sums *received by them* for continued renewals of policies. This contract is plain and explicit; there is no doubt or ambiguity as to the meaning of it, or as to the intention of the parties; but it is contended the evidence was admissible to annex an incident to the contract, by the proof of usage or custom. But in all cases of this sort the rule for admitting the evidence of usage or custom must be taken with this qualification, that the evidence be not repugnant to, or inconsistent with, the contract.

Although evidence of a general usage or custom of any business or trade, when it is of universal practice, may be admissible to explain what is doubtful, it is not admissible to contradict what is plain, as where a policy was made in the usual form, upon a ship, her tackle, apparel, *boats*, etc., evidence of usage that the underwriters never pay for the loss of boats slung upon the quarter outside of the ship, would not be admissible: Greenleaf's Evidence, volume 1, sections 292-294. In the case of the schooner Reeside, 2 Sumner's Reports, 567, it was held that an express contract of the parties is always admissible to supersede, vary or control a usage or custom, but that an express contract could not be controlled or varied, or contradicted by a usage or custom. The rule is, that when parties make an express contract, as in this case, which is plain, evidence of usage and custom is inadmissible to control, vary or contradict it. Nor do we think the questions propounded to the witness were strictly legal questions to prove a general usage or custom. The questions propounded to the witness were: "Do you know of *any* usage or custom in the life insurance business as to the commutation

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of renewals," etc.? The proper question would have been, "What is the general or universal usage and custom in the life insurance business as to the commutation of renewals," etc.? The usage or custom to be binding, must be a general one, and of universal practice, as applicable to that particular business: Code, section, 1. In looking through this entire record, we find no error in the rulings of the Court, or in its charge to the jury, or in its refusal to charge as requested, in view of the evidence contained therein, and the verdict was right under the law and facts of the case.

Let the judgment of the Court below be affirmed.

F. H. HALL, plaintiff in error, vs. THE STATE OF GEORGIA,
defendant in error.

F. H. Hall was tried upon an indictment containing two counts, one for assault with intent to murder, and one for shooting at another, not in his (the prisoner's) own defense. On the trial it was proposed to prove by the defense as a part of the *res gestæ*, the prisoner's statement, as to how he received a certain bruise on his arm. The statement was made some ten or twelve minutes after the shooting, after the difficulty was entirely over, after the prisoner had been arrested, and whilst he was in charge of the bailiff on his way to prison:

Held, That it was not error in the Court to reject the statement.

Criminal law. *Res gestæ*. Evidence. Before Judge HOPKINS. Fulton Superior Court. April Term, 1872.

Hall was placed upon trial for the offense of an assault with intent to commit murder, alleged to have been perpetrated upon the person of one Thomas Cushman, on December 5th, 1871. The indictment also contained a count charging defendant with the offense of shooting at said Cushman, not in his own defense, nor under circumstances of justification. The defendant pleaded not guilty.

During the trial the defendant proposed to prove by Thomas

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Newman, the officer who arrested him, as a part of the *res gestæ*, his statements made some ten or twelve minutes after the shooting, on his way to the city guard-house, as to the circumstances under which he received an injury to his arm, which he then and there exhibited.

The Court excluded the evidence, and the defendant excepted.

The jury returned a verdict of guilty on the second count. Whereupon, the defendant moved for a new trial, upon the ground, amongst others, that the Court erred in his exclusion of the testimony of the witness, Newman, as to his statements on the way to the guard-house.

The motion was overruled, and the defendant excepted.

GARTRELL & STEPHENS; T. P. WESTMORELAND, for plaintiff in error.

JOHN T. GLENN, Solicitor General, for the State.

The time between the shooting and the sayings of the defendant was too long to make it admissible: 27 Georgia, 296; 11 *Ibid.*, 615. The joinder of the counts was proper: 43 Georgia, 518; 27 *Ibid.*, 723.

McCAY, Judge.

The *res gestæ* of a transaction is what is done during the progress of it, or so nearly upon the actual occurrence as fairly to be treated as contemporaneous with it. No precise point of time can be fixed *a priori* where the *res gestæ* ends. Each case turns on its own circumstances. Indeed, the inquiry is rather into events than into the precise time which has elapsed. Is the proof offered of a matter fairly a part of the same transaction? Is it an event happening naturally and spontaneously as a part of the occurrence under investigation? If so, the law permits it to be proven as part of it, since the whole scene, as it has transpired, ought to appear to the tribunal called upon to determine its character. Matters occurring before or after, that is, before the transaction begun or

after it ended, are not part of it. To make them such, they must be so nearly connected with the *actual* occurrence as to be without the suspicion of afterthought or forethought: Rev. Code, section 3720. They must be within the shadow, as it were, of the transaction itself. Is that so in this case? The quarrel was over, some minutes had elapsed, the parties had separated. The prisoner had been arrested. He had waited at the cloak room for his over-coat, in charge of the officer; that had been obtained, and the officer and he had gone some one hundred and fifty yards, towards the guard-house. The occurrence was over—completely over. New events had occurred, and what the prisoner said can, by no fair inference, be made part of the event in which this shooting occurred. It is not so closely connected with the event as to be free from all suspicion of afterthought or device. Indeed, there seems to us no reason why any statement made by him at any time is not admissible if this is. It has, to one hearing it, *no* force, except that given to it by its reasonableness or by the manner of the narrator, or his character. As such matter, the prisoner could have made it on his trial. But it has not, in our judgment, *any* force as a part of the spontaneous acts going to make up the whole transaction, at the time, nor is so closely connected with the occurrence as to be without the suspicion of afterthought.

Judgment affirmed.

B. J. WILSON & COMPANY *et al.*, plaintiffs in error, vs. WILLIAM C. RIDDLE, defendant in error.

Where three distinct suits are proceeding in favor of different parties on the same claim, two of them being for the whole claim, and the third for a large part thereof, against the same defendant, and the trial of each case would involve an investigation into long and complicated accounts, running through a series of years, to the amount of hundreds of thousands of dollars, equity will consolidate them, and by one decree dispose of the litigation. (R.)

Wilson & Company *et al.* vs. Riddle.

Equity. Injunction. Multiplicity of suits. Before Judge HILL. Washington county. At Chambers. March 18th, 1873.

For the facts of this case, see the decision.

LANIER & ANDERSON ; R. L. WORTHEN, for plaintiffs in error.

JACKSON, LAWTON & BASINGER, for defendant.

TRIPPE, Judge.

B. J. Wilson & Company were the factors of W. C. Riddle. On May 5th, 1870, Riddle gave to Wilson & Company his promissory note, at thirty days, for \$90,000 00, and a mortgage as security therefor on realty. The note was given, not for an exact amount of indebtedness then due, but for what might be then due, and for future advances. Wilson & Company had made before that time, and did afterwards make, large advances to Riddle—to an amount much larger than the amount of the note, but which, by cotton forwarded them by Riddle, was reduced to about \$68,000 00, as claimed by them, on January 25th, 1871. On that day, Riddle gave Wilson & Company four other notes, amounting to about \$18,000 00, not as increasing his indebtedness then owing, but as part of the same \$68,000 00, and as claimed by Wilson & Company, for considerations accruing after the making of the \$90,000 00 note. Riddle claims it was for the whole balance of his indebtedness to Wilson & Company. At the time these four smaller notes were given, Riddle gave as security for them a mortgage on personalty for \$7,000 00, and what are called crop liens for \$11,000 00, jointly with Thigpen on part of said crop liens, and on another portion thereof. Previous to this, in 1868, Evans, Gardner & Company, of New York, had obtained judgment against Riddle in the Circuit Court of the United States for some \$5,000 00, and Wilson & Company had obtained a transfer of the execution issued thereon to themselves, and had entered on their books, as a charge against

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Riddle, the money advanced for said transfer, and which amount is part of the \$68,000 00 now claimed to be due by Riddle on the \$90,000 00 note and mortgage.

On the 1st February, 1871, Wilson & Company transferred the \$90,000 00 note and mortgage to Samuel J. Armstrong, of New York. Armstrong commenced suit on the note in the Circuit Court of the United States for the Southern District of Georgia, on the 17th March, 1871. Riddle filed a bill in said Circuit Court, praying, amongst other things, an injunction against said suit. After the hearing and overruling of a demurrer to said bill, Armstrong dismissed said common law action. The bill is still undisposed of by any order or decree of that Court.

Armstrong also commenced proceedings at the April term, 1871, of the Superior Court of Washington county to foreclose the mortgage of \$90,000 00. To these proceedings a defense was made, and on the 20th January, 1873, a bill for injunction was filed to restrain Armstrong from prosecuting the same, and setting up generally the facts and equities contained in the last bill hereafter mentioned, the decision on which is here for review.

B. J. Wilson & Company foreclosed the mortgage on personalty, and instituted proceedings to enforce the crop liens for the four smaller notes, constituting the \$18,000 00 securities. This was done in November, 1871, and on February 15th, 1872, Riddle obtained an injunction against these proceedings, alleging same equities, and praying, generally, similar relief as asked for in his bills against Armstrong.

B. J. Wilson & Company transferred the execution issued from the Circuit Court of the United States in favor of Evans, Gardner & Company, to one B. M. Hill, and said execution, on the 23d of May, 1872, was levied on the property of Riddle, and a bill was filed by him, on the 17th June, 1872, in said Circuit Court, to enjoin a sale under that execution.

On the 17th February, 1873, B. J. Wilson, as bearer, commenced an action against Riddle in the Superior Court of Washington county, on the \$90,000 00 note.

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All of these suits were pending on the 18th day of March, 1873, except the suit in the Circuit Court of the United States in favor of Armstrong against Riddle, on the \$90,000 00 note, which was dismissed by Armstrong; and Wilson and Wilson & Company and Armstrong claim that such dismissal carried with it the bill which Riddle had filed in said Court to enjoin it, and also a supplemental or amended bill subsequently filed by Riddle in the same Court, embracing an application for injunction restraining Armstrong from proceeding in the Superior Court of Washington county to foreclose the \$90,000 00 mortgage, and setting up the same rights and equities as are alleged in the bill next referred to, and the decision on which, by the Court below, is here for review.

On the 18th March, 1873, the present bill was presented to the Chancellor for an injunction, reciting and charging all the foregoing facts as to the various suits, etc., that all of said evidences of debt and the securities therefor constitute but one debt, and that debt is whatever may be due, if anything, after a full accounting between Wilson & Company and Riddle on the \$90,000 00 transaction, that said amount can only be ascertained from an examination of the books and accounts of Wilson & Company, embracing several hundreds of thousands of dollars, running through five or six years, that fraudulent charges and omissions of credits and mistakes are in said accounts, that said suits and levy by different persons are all for the same debt and in different jurisdictions, and that Wilson & Company are the real and only creditors and owners of all the evidences of debt, and that these facts make a case for an injunction of all the said proceedings in the State Court, and for all parties, to-wit: Samuel J. Armstrong, B. J. Wilson & Company, and B. J. Wilson, to be brought together in one suit, that the correct amount that may be due by Riddle, if any, may be ascertained, and the final rights of all parties determined.

Wilson & Company deny any fraudulent entries or omissions in their accounts, or any mistake now existing, or that the \$7,000 00 mortgage on personalty is part of the \$68,000 00

claimed by them to be due on the \$90,000 note and mortgage; that all of said securities are *bona fide* and just, and that said sum of \$68,000 is justly due by Riddle, and claim that the rights of the parties can be asserted at law, and a resort to equity is unnecessary. The Chancellor ordered this last bill to stand as an amendment to the former bill filed against B. J. Wilson & Company, and granted the injunction prayed for until further order of Court.

The great question in the case, and the one chiefly urged in the argument, is whether this is a proper case for equity to intervene by an injunction, so as to stay the various proceedings at law in the State Court, to consolidate parties and causes, and to bring this vast array of litigation to one head, and by one battle close what appears to be an interminable conflict.

A single statement would seem to settle this question. Samuel J. Armstrong has a suit to foreclose the \$90,000 00 mortgage as assignee thereof. B. J. Wilson, as bearer, has brought suit on the \$90,000 00 note. B. J. Wilson & Company are proceeding to enforce the mortgage and crop liens for the \$18,000 00, (the four smaller notes) \$11,000 00 of this \$18,000 00 are admitted to be but part of the same sum claimed in the \$90,000 00 suits. Thus there are two distinct parties claiming the same debt, each in his own suit, and a third party claiming \$11,000 00, a part of the same debt in another suit. It would hardly be possible for a defendant in these various actions by different parties to protect himself from loss, if not ruin, by any resources that are furnished him by the common law, or under any equitable rights he may, by statute, have at law. If each plaintiff obtained the judgment he is seeking, two of them would have judgments for \$68,000 00 each, and one for \$18,000 00, or \$154,000 00 in all, when it is admitted that \$68,000 00, with interest, or \$75,000,00—if the \$7,000 00 mortgage is not part of the \$68,000 00—is all that is due. It is true that the two largest of these judgments would be shown by the record to be for the same debt, one at law on the note, and one on foreclosure of the mortgage given to secure it, and that such a case often oc-

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curs, and is legal and proper. So it may be, when the same creditor has both securities, the note and the mortgage, and a payment of either is a discharge of the other. But where the plaintiffs are different, a defendant would hazard much if such judgments were rendered against him. At any rate, where different persons are thus on the record, rival claimants for the same debt, the debtor has the right to bring them together, and by one judgment protect himself and ascertain who is his real adversary. This would be difficult, if not impossible to be done at law, and surely in such an emergency equity will not turn a suitor asking protection, from her door. The proceedings on the \$18,000 00 securities, in still another name, another claimant on the same debt, certainly removes all doubt, and make the debtor's demand for equitable relief irresistible. No agency at law could grant him as full and ample remedy as he might require, and as equity only could grant him.

But, besides all this, if, under the equitable rights which the debtor might have at law, he could, in all these separate actions by different parties against him, be heard in his defense at law as to their several rights, and as to his own rights, involved in the question as to what is his true indebtedness, if any. Yet the facts in this case, involving long and complicated accounts for several years, to the amount of hundreds of thousands of dollars, to ascertain the true balance due, the issues made on the validity and fairness of some of these securities, and how they are to be credited, if paid or allowed—all of which would have to be investigated in each case, and most probably, if not certainly, by different juries, make it a strong case, "where a multiplicity of suits would render a trial difficult, expensive and unsatisfactory at law:" Code, section 3075.

One other view: a creditor has a right to enforce all the securities he holds for a debt until the debt is paid, and in this case this right is being fully asserted. Suppose, on the trial at law on either of the \$90,000 00 securities—the note or the mortgage—it should be adjudged that only the sum of \$10,000 00 or \$15,000 00 was due. That amount so ascertained

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would be the amount of the judgment on the other of those two securities. But the \$18,000 00 securities are respectively for \$7,000 00 and \$5,200 00, and two for \$2,900 00 each. How would the judgment for \$10,000 00 or \$15,000 00 be disposed of or divided and appropriated between those several smaller securities? How much of it would be taken as part of the one or the other of the four small mortgage and crop lien papers? The plaintiffs have asserted their right to enforce them, and they have this right, and the right to enforce all until the debt is discharged. But in the case put, (and complainant's bill presents the case for such a result,) how can the rights of the creditors be enforced and the rights of the debtor be protected, except by one joint trial for all the parties, and of all the issues.

The difficulties that would attend the trial of these several cases at law would be still further complicated on account of the proceedings in the case of the levy of the Evans, Gardner & Company execution issued from the Circuit Court of the United States on the property of complainant. That execution is for a part of the debt, constituting the \$90,000 00 claim.

Let the judgment of the Court below be affirmed.

WILLIAM DOUGHERTY, plaintiff in error, *vs.* JACOB FOGLE,
defendant in error.

WILLIAM DOUGHERTY, assignee, plaintiff in error, *vs.* JAMES
BARBER *et al.*, defendants in error.

1. The cases on the docket having been continued for providential cause at the first and second terms thereof, and William Dougherty having died during the second term of the Court, the motion to dismiss all the cases for want of jurisdiction to hear them should be overruled. (R.)
2. The motion to dismiss the case of William Dougherty, assignee, *vs.* James Barber *et al.*, on the special grounds stated in the motion, cannot be entertained now, inasmuch as the plaintiff has no legal representative before the Court, but the defendants may suggest the death

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of the plaintiff on the record, and take such further proceedings in the case as are authorized by the 26th Rule of this Court. (R.)

8. In all the other cases in which William Dougherty, Esq., was of counsel only, the parties must be prepared to prosecute the same at the present term of the Court, or they will be dismissed. (R.)

Continuance. Providential cause. Practice in the Supreme Court. Jurisdiction. Before the Supreme Court. January Term, 1873.

In addition to the two cases above stated, there were upon the docket of the Supreme Court thirty-seven other cases in which William Dougherty, Esquire, was either plaintiff in error or of counsel for the plaintiff in error. All of these causes were returnable to January term, 1872. At that term, on account of the sickness of Mr. Dougherty, they were continued for providential cause. At the July term, 1872, they were again continued for the same cause. During this term of the Court, but after the continuance of said cases, Mr. Dougherty died. When the cases were called at the January term, 1873, counsel for defendant in error moved the Court for an order dismissing the writs of error, upon the ground that the Supreme Court had no jurisdiction under the Constitution to hear them, after the expiration of the second term.

A motion was also made to dismiss the case of William Dougherty, assignee, *vs.* James Barber *et al.*, on special grounds stated in the motion, unnecessary here to be set forth.

H. L. BENNING; M. J. CRAWFORD; R. J. MOSES; W. F. WILLIAMS, for the motion.

A. B. CULBERSON; A. T. AKERMAN, *contra.*

WARNER, Chief Justice.

1. When the Supreme Court was originally created by an amendment of the State Constitution, all cases in that Court had to be disposed of at the first term, except for providential cause. The Court could not, in its discretion, withhold its judgment until the next term after the case was argued. To

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enable the Court to do that, the power to do so was granted, as we find it in the Constitution of 1868. The Constitution, instead of declaring that all cases should be disposed of at the first term, except for providential cause, now declares that the Supreme Court shall dispose of every case at the first or *second* term after the writ of error is brought. The case is to be prosecuted, or argued now, at the first term of the Court, unless prevented by providential cause, just as was required to have been done under the original amended Constitution creating the Court, but under the power granted to dispose of every case at the first or *second* term after the writ of error is brought, the Court may, in its discretion, withhold its judgment until the next term after the case is argued, which it could not have done unless the power had first been granted to extend the disposition of the case to the second term of the Court, instead of restricting such disposition of the case to the first term, as was done under the original Constitution creating the Court, and that was all the Constitution of 1868 intended when it declares that the Court shall dispose of every case at the first or second term after the writ of error is brought, leaving the question as to prosecuting the case when prevented by providential cause just where it stood under the old Constitution. The cases on the docket have been continued twice for providential cause, the plaintiff is now dead, and the question is, whether the same shall be dismissed for want of jurisdiction of the Court to hear them under the Constitution after the expiration of the second term of the Court.

It is insisted that the continuance of the cases for providential cause does not take them out of the provisions of the Constitution before cited, which requires the Court to dispose of every case at the first or second term after the writ of error is brought; that providential cause after the first term constitutes no exception. This provision of the Constitution should receive a reasonable interpretation. Providential cause is recognized by the Constitution as a valid cause for not prosecuting the case at the first term, but does not restrict the continuance of the case for providential cause to the first term *only*. The

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case is to be heard at the first term, but providential cause is a good reason for not hearing it at that term. Why should not providential cause be equally as good a reason for not hearing the case at the second as at the first term? The Constitution does not declare that cases shall not be continued after the first term for providential cause, or that no case shall be continued more than once for providential cause. The fair and reasonable interpretation of the Constitution is, that the Court shall dispose of every case at the first or second term after writ of error brought, unless the parties are prevented from prosecuting the same by providential cause. Providential cause is the only exception recognized by the Constitution as an excuse for delay. When a party is prevented from prosecuting his case, either at the first or second term of the Court, by providential cause, there is nothing in the Constitution which imputes to him *laches* or default on that account. The act of God worketh injury to no one, and that is the principle recognized by the Constitution in the prosecution of cases in this Court. Unless prevented by providential cause, every case must be prosecuted at the first term of the Court after the writ of error is brought, and must be disposed of by the Court at the first or second term, but the Court may, in its discretion, withhold its judgment until the next term after the case is argued under the power granted to dispose of it at the second term of the Court, and this may be done without any providential cause being shown. This grant of power to the Court, to dispose of the cases in its discretion at the first or second term, had no reference whatever to the continuance of cases for providential cause. That question stands under the new Constitution just as it stood under the old one. If a case should be continued at the first term for providential cause, and just before the second term of the Court the party should die, or should die during the second term, as in this case, and his estate unrepresented, the case would have to be dismissed, under the construction contended for. The providential cause of the party's death would not save it. The death of the plaintiff during the second term of the Court, or at any other

time, is not made by the Constitution an exceptional case of providential cause, and the Courts should not make it one and disregard all other cases of providential cause in giving a construction to those words. The fair and reasonable interpretation of the Constitution, in our judgment, is to hold that when a party is prevented by providential cause from prosecuting his case in the Court, that no *laches* is to be imputed to him, and that the time within which he is to prosecute his writ of error does not run against him, that he is excepted from having his case dismissed on the ground of providential cause: Broom's Legal Maxims, 171. The cases on the docket having been continued by this Court for providential cause at the first and second terms thereof, and Mr. Dougherty having died during the second term of the Court, the motion to dismiss all the cases for want of jurisdiction of the Court to hear them should, in our judgment, be overruled.

2. The motion to dismiss the case of William Dougherty, assignee, vs. Barber *et al.*, on the special grounds stated in the motion cannot be entertained now, inasmuch as the plaintiff has no legal representative before the Court in that case, but the defendants may suggest the death of the plaintiff on the record, and take such further proceedings in the case as authorized by the 26th rule of this Court if they shall think proper to do so.

3. In all the other cases in which Mr. Dougherty was counsel only, the parties must be prepared to prosecute the same at the present term of the Court, or they will be dismissed.

FREDERICK COX, plaintiff in error, vs. SAMUEL W. COX, defendant in *fi. fa.*, and GEORGE WADSWORTH, claimant, defendants in error.

Under section 3027 of Irwin's Revised Code, authorizing parties having equitable causes of action to institute proceedings for their recovery on the law side of the Superior Court, it is not competent for a plaintiff in execution on the trial of an issue, made upon an affidavit of a "claim

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ant," of a tract of land levied on by the *fi. fa.*, to enlarge and change the issue by alleging that, though the land is not subject to the execution, yet it was bought by the claimant from the defendant, with full notice that the purchase money for the same was still due to the plaintiff, and that the land is therefore subject to the vendor's lien for the purchase money, which is the debt on which the judgment levied is founded. The amendment is not sufficiently germane to the issue formed under our claim laws to justify it.

Claim. Equitable remedy. Amendment. Before Judge McCUTCHEM. Whitfield Superior Court. July Adjourned Term, 1872.

Frederick Cox levied an execution in his favor against Samuel W. Cox, on a lot of land in the county of Whitfield, which was claimed by George Wadsworth. When the issue thus formed was called for trial, plaintiff in *fi. fa.* proposed to amend the pleadings substantially as follows:

That the property levied on is subject to the payment of said execution, because the amount due on the judgment is for the purchase money of the same. Plaintiff prays that his lien as vendor may be set up and enforced, for that at the time of the sale of said land the defendant executed his note, dated June 27th, 1854, for \$200 00, which recited that it was for the purchase money of said lot of land, plaintiff at the same time executing his deed to said lot, conveying the same to the defendant. That plaintiff, at the time of the sale, insisted and intended to insist upon his lien as vendor for the purchase money. That plaintiff now insists, and proposes to show that the claimant, at and before his purchase of said land from said defendant, was fully acquainted with the facts aforesaid. That plaintiff, under these circumstances, insists that the land shall be made subject.

To this proposed amendment claimant demurred. The demurrer was sustained, and plaintiff excepted.

The evidence made the following case:

Judgment was rendered in favor of plaintiff against defendant, on November 7th, 1866, and execution issued on the 27th day of the same month. A levy was made on the land

in controversy on April 6th, 1869, and a claim entered by Wadsworth on the 24th day of the same month. The lot was conveyed by plaintiff to defendant on June 27th, 1854, and possession held by the latter until May 20th, 1862, when he conveyed the same to claimant. In the course of the trial plaintiff proposed to prove the facts set up in the amendment aforesaid. The evidence was excluded, and plaintiff excepted.

The jury returned a verdict in favor of the claimant. Plaintiff assigns error upon the exceptions aforesaid.

JESSE A. GLENN ; W. H. DABNEY, for plaintiff in error.

J. A. R. HANKS ; D. A. WALKER ; W. K. MOORE, for defendant.

McCAY, Judge.

We recognize fully the right of any suitor to set up, on the law side of our Superior Court, "an equitable cause of action." Section 3027 of Irwin's Revised Code expressly permits this to be done, and authorizes and directs the Court to so mould its proceedings as to give effect to this right. Nor are we able to see why this section of the Code does not include causes of action which are purely equitable, as well as those recognized, though not fully enforced, by Courts of law in England and in other States, by reason of the defective machinery of such Courts. The words of the Code are, "an equitable cause of action." This can only mean a right which a Court of equity will enforce, and if it means anything, it must include rights which, before that time, were purely of equitable cognizance, as well as those which, while fully recognized at law, were only imperfectly enforced, by reason of the rigidity and narrowness of its machinery.

The truth is, that the Act of 1820 was intended to declare that common law Courts had, in this State, full equity jurisdiction, except to compel an answer, on oath, from the defendant. But as the Act of 1820 gave the Superior Court no

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power to alter its former modes of proceeding or mould its processes and proceedings, otherwise than as they, from time immemorial, had existed, the Act of 1820 was, in many respects, a dead letter. But section 3027 of the Code, in terms, meets this difficulty, and clothes the Court with this power, so that now it is the plain, clear law of this State that "*no suitor* is compelled to appear on the equity side of the Court, but he may institute *his* proceeding for *an equitable cause of action* upon the common law side of the Court at his option, and the Court may allow the jury to find a verdict and a judgment be rendered thereon so moulded and framed to give equitable relief in the case, as verdicts and decrees are rendered and framed in equity proceedings." If to this general provision, conferring jurisdiction to the common law Court of equitable causes of action, we add section 3185 of the Revised Code, that "for every right there shall be a remedy, and every Court having jurisdiction of the one may, if necessary, frame the other." We are not prepared to say that there is *any* equitable right recognized, as capable of enforcement by a Court, that may not be enforced in some Court of *law* in this State.

The right to institute a proceeding for an equitable cause of action is given. The right to frame the form of the remedy and the right to mould the judgment are all fully and expressly given. What else is wanting? Nothing, as I think, to give power. If anything is wanting, it is some provision to restrain rather than to enlarge the equitable powers of a Court of law, or to abolish the equity side of the Court altogether. As the matter stands now, we have a Court of law with full equity powers, and a Court of equity with nothing but equity powers, and the anomaly exists of a state of things when, if you *call* the Superior Court, in your petition, simply the Superior Court, you *may*, if you plead and pray rightly, get a decree covering the powers of both a law and an equity jurisdiction; but if you call the Court, in your petition, a Court of equity, you may be driven from the tribunal by a decision that there is an *adequate* remedy at law, and yet the statute

gives a remedy at law in all cases. We hope the Legislature will correct this anomaly.

But whilst, as we have said, we fully recognize the equitable jurisdiction of a Court of law, we do not and we must not in either forum mix up and confound rights and causes of action wholly distinct in their nature. You cannot join a claim for damages caused by slander with a claim for money due on a promissory note. You cannot sue out a distress warrant for rent and add a count for the price of a horse. You cannot commence a suit for the foreclosure of a mortgage, under the statutory privilege of a rule *nisi*, and amend it by praying for the ejection of an intruder. In other words, we do not understand by this enlargement of the powers of a Court of law, that a Court of law can grant equitable relief except upon proper pleadings. We doubt not that with proper averments and parties, a Court of law may decree the sale of land to satisfy an equitable lien; but we do not think this could be done by way of amendment to a process for ejecting a tenant holding over after the expiration of his term.

Our claim laws afford a statutory remedy for a special case. They are *sui generis*. An officer has seized and threatens to sell a tract of land, by virtue of an execution against A. B insists that the land does not belong to A, and that it is not *subject* to the *judgment* against A; that the sheriff has no *authority* to *seize* and *sell* the land. Our claim laws provide that in such cases, the party setting up the claim may file an affidavit, etc., that the sheriff shall not sell, but return the papers, etc., and that an issue shall be made up and tried, etc. That has been done in this case. It is now proposed to change the issue entirely. The proceeding was instituted by the claimant to test the question whether the land was *subject* to the *judgment*; whether the sheriff had a right, by *virtue* of the *process* in his hands, to seize and sell it.

It is now proposed to amend the issue by admitting that the land is *not subject to the judgment*, that the seizure of it was a trespass, but that the plaintiff is nevertheless entitled,

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after he has got another judgment, to sell the land for the payment of this debt. It seems to us that this is an utter misconception of the claim laws. The proceeding they provide for is just as special and confined to the particular matter of the levy and the *lien* of the judgment, as a distress warrant is confined to rent, or a rule against the sheriff to contempt. Here is a levy on *land*, the law requires the issue on the claim affidavit to be tried in the county where the land lies. It is proposed to combine with this an issue which is essentially personal, and must be tried in the county of the defendant's residence. The plaintiff comes into Court and admits that he had no right to have the land levied on—that the claimant's affidavit is true in every sense—true at law and true in equity. The land is, in fact, *not* subject to the judgment, nor can it be made subject to the lien of this *present* judgment, either at law or equity. Suppose the amendment proposed had said that though the land was not subject to the judgment, yet he, the plaintiff, had a written mortgage, duly recorded, made by the owner of the land for the note on which this judgment is founded, and that, therefore, the land though not subject to the lien of the judgment levied, was yet subject to the mortgage lien which he prayed might be foreclosed. I put these instances to show, as I think, the absurdity of the position assumed by the plaintiff in error.

We think the Court was right in refusing this amendment. It was not germane to the matter in hand. It admitted the plaintiff out of Court. We do not intend to say that both the plaintiff and the claimant may not introduce amendments setting up equities, but that the equities set up must go to illustrate the issue, to-wit: the *authority of the sheriff* to make *the levy*. They must show that the land is subject to the *lien of the judgment* on the part of the plaintiff, or if put on by the claimant, they must go to show that the land is not subject.

• Neither party can set up a new and distinct issue, as that one owes the other, or that if the judgment is not a lien, some other paper or parol contract does give him a lien on the land;

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that if he has not now an authority to seize and sell the land, certain facts exist which will justify the Court in giving a judgment which will authorize him to do so.

Judgment affirmed.

WARNER, Chief Justice, concurring.

I concur in the judgment of the Court in this case, on the ground that a common law Court in this State has no jurisdiction to enforce a vendor's equitable lien on the land. If the common law Court has jurisdiction for that purpose, I see no good reason why it should not be enforced in a claim case pending on the common law side of the Court, as well as in any other case, and the verdict be so moulded as to do full justice to the parties, as provided by the 3504th section of the Code. The vendor's equitable lien on the land for the unpaid purchase money due therefor is not such an equitable *cause of action* as may be instituted on the common law side of the Court, as contemplated by the 3027th section of the Code. The vendor's lien is the mere creature of a Court of equity, and can only be recognized and enforced in that Court. Generally, equity jurisprudence embraces the same matters of jurisdiction and modes of remedy in Georgia as was allowed and practiced in England: Code, 3045.

JAMES R. SHELDON, plaintiff in error, vs. THE SOUTHERN EXPRESS COMPANY, defendant in error.

1. Where A is indebted to B, and transfers to him as collateral security a receipt given to A for a note for collection, it being for a larger amount than A's debt to B; and the bailee who has the note for collection, with knowledge of the transfer and consenting thereto, permits it to go into the possession of A, who collects it and pays B a portion of his debt, the measure of damages in an action of trover by B against the bailee, is the unpaid portion of B's debt from A. As B would not be liable over to A for any balance, his claim for damages is limited to the amount of his special property in the note.

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2. On the trial it was competent for the bailee to prove that when he was notified by A and B, who were together, of the transfer, he was not informed that it was made as collateral security, but on the contrary it was stated by A that the transfer was made only that the money might be paid to B in the event that A was absent, as he expected to be absent, provided B was present when such a statement was made.
3. Under the facts as they appear in the record, it would have been proper to have submitted the question to the jury whether B was present at the time A made the statement to the bailee's agent.

Bailment. Evidence. Before Judge SCHLEY. Chatham Superior Court. May Term, 1872.

Sheldon brought suit against the Southern Express Company for the value of a promissory note, dated January 4th, 1868, due January 1st, 1870, for the sum of \$1,250 00 in gold, with interest thereon at ten per cent. from date, signed by C. S. Bennett, which note he alleged that he delivered to the defendant at Savannah, Georgia, on December 6th, 1869, to be conveyed to Columbia, Texas, there to be collected and the proceeds to be returned to him at Savannah. He further alleged that the defendant has neither returned to him the note or its proceeds, to his damage \$5,000'00. The defendant pleaded the general issue.

The facts of the case are as follows:

On the day stated in the declaration, one Frank Tillman delivered the note in controversy at Savannah, to the defendant, taking a receipt therefor, in which the defendant agreed to collect said note, together with the interest on another note due by the same party, amounting in all to \$1,500 00 in gold. Tillman was indebted to the plaintiff in the sum of \$1,007 50, to secure the payment of which he transferred the said express receipt to him, of which due notice was given to the defendant. When the note reached its destination the maker was unwilling to pay the interest on the other note unless it was produced, and the defendant declined to receive the principal and interest on the note in its possession unless the entire amount, making in all \$1,500 00 in gold, was paid. The defendant notified Tillman of these facts, who informed the

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plaintiff, and asked him to go to Texas to attend to the matter, which he declined doing. Tillman went to Texas, procured the note from the defendant, collected from the maker \$1,550 00, returned to Georgia and paid to the plaintiff \$220 in gold.

The matter directly in issue was whether the defendant was liable to the plaintiff for the entire value of the note, or only for the balance due by Tillman on the indebtedness, to secure which the note was transferred.

Under the instructions of the Court the jury returned a verdict for the plaintiff for \$1,500 00 in gold, with interest from January 1st, 1870. Whereupon, the defendant moved for a new trial upon the following grounds, to-wit:

1st. Because the evidence discloses that the said express receipt was transferred to Sheldon, the plaintiff, to secure a debt of \$1,007 50, in currency of the United States, and that the sum of \$220 00 in gold was paid by Tillman to Sheldon out of the proceeds of the note collected by him in Texas, thus reducing the sum actually due Sheldon by Tillman to less than \$800 00 in currency, whereas, the verdict of the jury gives him \$1,500 00 in gold, with interest from the 1st of January, 1870, and is contrary to law.

2d. Because, if Sheldon recovered in this action more than the amount actually due to him by Tillman, he must recover and hold the same as the trustee for Tillman, whereas, Tillman actually has no interest in said amount, having already received the note from the defendant, and collected the whole amount.

3d. Because the said Judge erred in excluding the testimony of Adams, to the effect that Tillman had explained to him that his reason for transferring the receipt to Sheldon was that he was going away from the city and wished the money paid to Sheldon only in the event of its coming during his absence, and that the fact of its being transferred as collateral security was never disclosed to him.

4th. Because the said Judge erred in ruling that the defendant could not explain its understanding of the contract

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made by the transfer of the receipt, when notice of the same was given to the agent, Adams.

5th. Because the said Judge erred in charging the jury, "that they could not take into consideration any of the evidence going to show what amount was actually due from Tillman to Sheldon, but that if they found that Tillman transferred the receipt to Sheldon, and that the defendant was notified of the transfer, then Sheldon was entitled to recover the full amount of the receipt, without regard to the amount due from Tillman to Sheldon, or any amount paid by Tillman to Sheldon."

The motion was sustained and a new trial ordered. The plaintiff excepted, and now assigns said ruling as error.

GEORGE A. MERCER; HENRY B. TOMPKINS, for plaintiff in error.

LAW, LOVELL & FALLIGANT; JOSEPH P. CARR, for the defendant.

TRIPPE, Judge.

1. The general rule in an action of trover, as to the measure of damages, is the value of the property wrongfully taken or converted; and this is so, whether the action be brought by the general or absolute owner, or by one who has a special property or interest in the thing, such as a bailee, pawnee, etc. Of this latter class, is one who holds the property as collateral security for a debt due from the bailor. The reason why the bailee in such a case as last stated, is allowed to recover the whole amount of the value of the thing pledged, is, because if the whole value is not greater than his claim, then all is his, and if it be greater, he is liable over to the general owner or bailor for any excess in its value beyond the debt for which it is pledged. And not only this, but it is the only way in which the bailor's right to that excess can be asserted, unless by two actions against the wrong doer. If, then, the reason of the principle that the bailee can recover the full

value of the thing converted, is on account of the ulterior interest of the bailor, and that interest be discharged or satisfied out of the property itself, will not the rule cease? The liability on the part of the bailee, as trustee for any surplus, no longer exists. The right of the bailor is gone by his own act in accepting satisfaction, and if what be left and what the bailee does recover, be sufficient, and in fact does discharge his whole claim, he can have no right to complain that he is not allowed to recover what belongs to nobody. This limitation on the measure of damages, restricting it in certain cases similar to this, to the real damage sustained by the plaintiff in the injury to his special property, is fully recognized in many cases: 9 Pick, 551; 4 Blackf., 348; 47 Penn., 118; Hilliard on Remedies for Torts, 412, 413; Sedg. on Damages, 482. In 18 Pick, 283, SHAW, Chief Justice, thus illustrates this point: "A factor has a lien on goods, to half their value. The principal becomes bankrupt, and the property vests in the assignees, subject, of course, to all legal liens. The assignees, denying and intending to contest the factor's lien, get possession of the goods and convert them. The factor brings trover, establishes his lien and recovers. How shall the damages be assessed? If he recover the full value of the goods, he will be responsible back to the defendants themselves, for a moiety of the value. To avoid circuitry of action, why should not damages be assessed to the amount of the lien. He is fully indemnified, the balance of the value is in the hands of those entitled to it, and the whole controversy is settled in one suit."

2. It does not satisfactorily appear from the record, whether or not the plaintiff was present at the time Tillman made the statement proposed to be proved by Adams, the agent of the express company. If he was present, the evidence was admissible. Its admission and consideration by the jury, would not be in violation of the rule that parol evidence cannot add to or vary a written contract. This was not an action on a written contract between plaintiff and defendant. It was an order indorsed on defendant's receipt to Tillman to pay the

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within to plaintiff. The evidence offered was to show why that order was given, to-wit: that it was only intended to make plaintiff the agent of Tillman. In *Carhart Brothers & Company vs. Wynn*, 22 Georgia, 24, it was held, that "it may be shown by parol evidence that the indorsement of a note was made for a special purpose, for instance, as an *authority to collect*." In that case the plaintiffs were permitted to prove that their own indorsement did not convey the title, and only constituted the *indorsee* an agent to collect, when such was the fact, and that fact was notified to one of the parties to the note (an indorser) who gave that agent notice to sue.

3. If the Court be clearly satisfied that the plaintiff was present, the testimony should be admitted. If it be evident that he was not present, of course it should not be admitted, for it then could not affect the plaintiff. The facts proven might leave it such a question as to be properly left to the jury under a proper charge by the Court on that point.

Judgment affirmed.

THE EAGLE MANUFACTURING COMPANY *et al.*, plaintiffs in error, vs. CHARLES WISE, defendant in error.

1. Where, in view of the previous rulings of the Supreme Court, it appears that a case was brought up merely for delay, damages will be awarded. (R.)
2. Where plaintiff in error seeks to withdraw the writ of error, the record will be opened, on motion of defendant in error, for the purpose of hearing his claim for damages. (R.)

Damages. Practice in Supreme Court. Before the Supreme Court. January Term, 1873.

This case came up on writ of error from Muscogee county. When it was called in its order on the docket, counsel for plaintiff in error asked leave to withdraw the writ of error. Counsel for defendant in error objected, and moved that the

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record be opened for the purpose of awarding damages on the ground that the case had been brought up for delay only. The record was opened and the question as to damages argued.

HENRY L. BENNING, for plaintiffs in error.

PEABODY & BRANNON, for defendant.

WARNER, Chief Justice.

In this case the plaintiff made a motion to withdraw his writ of error. The defendant in error objected, and made a motion to open the record for the purpose of claiming damages. On looking through the record in this case we are of the opinion, in view of the previous rulings of this Court, that this case was brought here for delay only. We therefore affirm the judgment of the Court below, with ten per cent. damages, as provided by the 4221st section of the Code.

LEMUEL KENDRICK, plaintiff in error, vs. J. B. O'NEIL,
FOSTER & COMPANY, defendants in error.

1. When A, holding a written obligation made by a partnership composed of three persons, received from one of them nearly one-half of the amount due, and gave to him a written receipt for the money, "to be credited on a certain written obligation" made by the firm "now in the hands of Hillyer & Brother for collection, and in consideration of said sum I do hereby consent and agree that the other partners shall and will duly pay the balance due on said obligation without further cost or detriment to the said Thrasher." Afterwards, the other parties failing to pay, A commenced suit on the obligation against the firm, and the firm pleaded the receipt and the covenant therein contained as a release from the debt, inuring by operation of law to the whole firm:

Held, That the latter clause of section 2810 of the Revised Code providing that "a bond to indemnify the debtor against his own debt, is equivalent to a release" does not apply to this receipt and agreement.

2. This is not the debt of the person taking the receipt alone, but a debt on which he is jointly liable with others, and whilst a release to him would be a release of all, yet a covenant to *indemnify* him, may well

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consist with the continuance of the debt as an existing obligation against all, which was, upon the face of the paper, the clear intent of this receipt; besides, the other partners were not parties to this covenant, and could not sue on it, nor was this Thrasher's own debt.

WARNER, Chief Justice, dissented.

Release. Bond of indemnity. Covenant. Partnership. Before Judge HOPKINS. Fulton Superior Court. April Term, 1872.

Kendrick brought suit against O'Neil, Foster & Company on the following instrument:

“ATLANTA, GEORGIA, December 27th, 1867.

“This writing will witness that there is a balance due of \$567 31 on a note given by John W. Grantham to L. Kendrick for the purchase money of a certain gold lot, in the county of Cobb, which the said Grantham afterwards sold to us, we agreeing and binding ourselves to pay off and take up his said note to Kendrick, and giving therefor our certain obligation therefor, in writing, and having made various payments on said note, there is still due from us the balance above stated, which amount of \$567 31 we promise to pay to said Kendrick, with interest from the 21st day of November, 1866, the date of the last credit. But it is expressly understood that this promise is given and delivered to George Hillyer, Esq., as the attorney of the said Kendrick, and that John B. O'Neil, one of the undersigned partners, claims a set-off of \$187 00 against said Kendrick for building a mill in the year 1860, but which, the said Kendrick being absent, his said attorney is not authorized to allow, and this new promise is given without prejudice to either party, as to any claim of set-off the one against the other, and all former papers are delivered up and canceled.

“J. B. O'NEIL, FOSTER & COMPANY,

“By J. B. O'Neil.”

The defendants pleaded the following instrument, given by plaintiff to John J. Thrasher, one of the partners composing

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the firm of O'Neil, Foster & Company, as a release to all the defendants :

“ATLANTA, GEORGIA, August 7, 1869.

“Received of John J. Thrasher \$300 00, paid by him, to be credited on a certain written obligation of O'Neil, Foster & Company to Lemuel Kendrick, dated December 27, 1869, and now in the hands of Hillyer & Brother for collection, and in consideration of said sum, I, as agent for said Kendrick, do hereby covenant and agree that the other partners shall and will duly pay the balance due on said obligation, without further cost or detriment to said Thrasher.

“GEORGE KENDRICK.”

Under the charge of the Court, the jury returned a verdict for the defendants. Whereupon, the plaintiff moved for a new trial, upon the ground that the Court erred in charging the jury, “that the legal effect of said receipt, signed by George Kendrick, was to release John J. Thrasher from his liability upon the instrument sued on, and that the release of Thrasher operated in law as a release of the other obligors, and that if the jury shall find that George Kendrick was the authorized agent, for that purpose, of Lemuel Kendrick, and that he, as such agent, gave the receipt referred to, then the other parties to the obligation were discharged.”

The motion was overruled, and the plaintiff excepted.

HILLYER & BROTHER, for plaintiff in error, submit that the case at bar is not within the operation of the principle contained in section 2810 of the Code, citing: 4 Ga., 185; 5 *Ib.*, 550; 3 Cowen, 155; 2 Johnson, 186; 8 *Ib.*, 58, 59; 20 Ga., 415, 676; 24 *Ib.*, 288; 30 *Ib.*, 731; 2 Story on Con., 994; 2 Parson on Con., 249, *et seq.*; 8 Mass., 480. The Code of Georgia a mere “compilation,” and in construing Code, old law looked to as a key: 37 Ga., 412; 38 *Ib.*, 510

THRASHER & THRASHER, for defendants.

McCAY, Judge.

Section 2810 of our Code is as follows: "A covenant never to sue is *equivalent* to a release; so, also, a bond to indemnify a debtor against *his own* debt." It is noticeable that this section does not say that a covenant not to sue or to indemnify one against his own debt is a release, but that it is *equivalent* to a release. It is noticeable also, that the latter clause of the section says, against his *own debt*, and does not say against his liability on a debt on which he is liable, jointly with others. And this language is very significant, for it is precisely the language of the common law. The doctrine that a covenant not to sue or a bond to indemnify one against his own debt is equivalent to a release, is found in Bacon's Abridgment, Release (a,) and is a familiar doctrine to every student of the old books. But the decisions are, so far as I can find, uniform that this doctrine does not, in any case, apply where the covenant refers to a debt on which the covenantee is not liable alone, but is liable jointly or severally with others. In *Lucy vs. Knyaston*, 2 Sackfield, 575; 1 Lord Raymond, 688, the Court, after laying down, in strong terms, that a covenant of A not to sue a debt he has against B, or to indemnify B against such debt is equivalent to a release, says: "Because *then* one should precisely recover the same damages that he suffered by the other bringing the suit. A is bound to B, and B covenants never to put the bond in suit against A; if, after, B will sue A on the bond, he may plead the covenant as a release. But if A and B be jointly and severally bound in a bond to C in a sum certain, and C covenants with A not to sue him, that shall not be a release, but a covenant only; because he covenants only not to sue A, but does not covenant not to sue B. For the covenant is not a release in its nature, but only by construction to avoid circuitry of action. For when he covenants not to sue *one* he still has a remedy, and then it shall be construed as a covenant, and no more." This same point was decided in *Dean vs. Newhall*, 8 Tennessee Reports, 168, and in *Hutton vs. Eyre*, 8 Taunton, 280.

Chief Justice MARSHALL, in *Garnett vs. Macon*, 2 Brockenborough, 220, 225, very elaborately discusses this question, and lays down the same doctrine, and quotes with approval the words of Chief Justice GIBBS in 6 Taunton, to-wit: "We must look at the principle on which the rule has been applied, that a covenant not to sue shall operate as a release. Where there is only A on one side and B on the other, the intention of the covenant by A not to sue B must be taken to mean a release to B, who is accordingly absolutely discharged from the debt which A undertakes not to put in suit against him. The application of the principle in that case not only prevents circuity of action, but falls in with the clear intent of the parties. But in a case like the present, it is impossible to contend that by a covenant not to sue the defendant, (B,) it was the intention of the covenantors not to sue the plaintiff (the other partner) who was able to pay what his partner might be deficient in. It would have been easier and a shorter method to have given a release than to make this covenant. The only reason for adopting this course was that they did not choose to execute a release to the defendant, because that would also have operated as a release to the other partner, whereas they considered that a bare covenant not to sue the defendant would not extend to his partner; as, therefore, the terms of the covenant do not require such a construction, (that it is a release) and as it would manifestly be against the intent of the parties, we are decidedly of the opinion that it ought not to be permitted so to operate." It is to be noticed that in this case the defendant was the person released, the other partner had paid the debt, and was suing him. The reply was that the covenant not to sue was a release of both, and that the payment by the other partner was gratuitous. Judge MARSHALL says: "I can add nothing to the language of Chief Justice GIBBS," but says in reference to the case before him, "that though it was a joint assumpsit and not a joint obligation, there is no difference in the principle as applied to the cases."

This same doctrine is laid down in *Collyer on Partnership*, thus: "Although a release to one partner is generally a

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release to all, yet a covenant not to sue one of several partners will not operate as a release to the others, because the use of such an instrument evinces an intention on the part of the covenantor to avoid the legal effect of a release as to co-partners;" and he refers to 4 Greenleaf, 421; 7 John, 207; 4 Wendell, 607; 19 John, 120; 21 Wendell, 424; 18 Pick, 416; 17 Massachusetts, 628; 24 Maine, 506, and other cases. A covenant to indemnify against a suit is not so strong as a covenant not to sue. A covenant to indemnify is the most that can be made of this agreement, and it distinctly reserves the right to go on the others. *Thrasher*, to whom the covenant is given, has no right to use this release as a means of preventing the plaintiff from doing the very thing he contracted to do, to-wit: to make the others pay it. Nor can the others use it, (the covenant,) because it is a covenant with Thrasher alone. They could not sue on it, because they are not parties to it. What shall be the effect on this covenant of a recovery here against all, is immaterial. If the covenant is ever claimed to be broken, the fact of breach and the damages will be for the Court and the jury to say. It is sufficient now to determine that it is not a release to any of the parties, much less to all.

Judgment reversed.

TRIPPE, Judge, concurring.

Plaintiff held a claim against the three defendants as partners, amounting, principal and interest, to not quite \$700 00, when Thrasher, one of the partners, paid \$300 00. Plaintiff gave Thrasher a receipt for the amount so paid, reciting that it was to be credited on the claim *then in the hands of his attorneys for collection*, and added, that for and in consideration of said sum, "I hereby covenant and agree that the other partners shall and will duly pay the balance due on said obligation, without further cost or detriment to said Thrasher." To a suit by plaintiff against all the partners, on the obligation, they pleaded said receipt as a discharge. They claim that the instrument given to Thrasher was a covenant not to sue him, by which

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he was released, and thereby all the partners were discharged. Was this a covenant not to sue Thrasher? It was a stipulation that the other partners should pay the balance of the debt, without costs or detriment to one partner of three, who paid more than one-third of the debt. The right of the creditor to the balance was reserved, and he expressly agreed that the other partners should pay it. By this express contract with Thrasher, he had the right to demand payment of the others. The right to make this demand was of little or no value, unless he had the further right to enforce the demand. This could not be done without suit. Suit could not be brought without including Thrasher, as a defendant with the other partners. Instead, then, of this agreement being one not to sue Thrasher, it would rather appear a suit was in contemplation of the parties to it, and if so, by necessary legal implication, all that was necessary to maintain that suit was reserved. If Thrasher agreed that the creditor should collect the balance out of his co-partners, and the right to collect carried the right to institute suit, and this involved the legal necessity to include Thrasher as a party, did not his acceptance of this agreement from the creditor amount to an assent that he might be sued, instead of its being a covenant that he never should be sued. It is impossible to deny that the creditor did not intend to give up his claim or right to the balance of the debt. Thrasher knew this and assented to it. The condition was, that the collection should be made from the other partners. Here then was a right—a right acknowledged by Thrasher. For that right there must be a remedy. The remedy would include Thrasher in a suit, if a suit be necessary. To concede or assent to the right, is to concede or assent to the remedy, or rather when the right is conceded by contract, the law gives the remedy. And if the right exists by contract, surely the remedy is not taken away by implication.

In this case, there was no express stipulation that Thrasher should never be sued. It can only be claimed by implication, and an examination of the terms of the agreement shows the implication to be rather to the contrary.

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It is further claimed that this is a covenant not to sue Thrasher, because if the creditor could obtain judgment against all the partners, and the others be insolvent, he could enforce the judgment against Thrasher and collect the judgment out of him, and this would be in violation of the agreement, and thus entitle Thrasher to recover back from the creditor the same amount he has been compelled to pay, and that the law does not permit such circuitry of action. I express no opinion whether all this could be done or not. But if it can be—if the creditor in this case could, after obtaining judgment against all the partners, enforce it against Thrasher, and then Thrasher recover from him, by suit, the same amount, it would not be as great a legal absurdity as it would be a legal wrong against the creditor, to deny him all the remedy necessary to enforce the right he expressly stipulated with Thrasher he should have, to-wit: to collect the balance of his debt out of Thrasher's partners. If, in doing this, there may be a seeming departure from the ordinary legal mode, it is on account of an express contract with Thrasher. No harm will be done, and no one can complain.

In *Couch vs. Mills*, 21 Wendell, 426, NELSON, Chief Justice, in holding that the instrument, *sub judice*, was not technically a release, but only a covenant not to sue, says: "That it was well settled that in the case of two or more joint obligors, it constitutes no defense to the action." Further held that "it was intended to protect the rights of the covenantee, which may be done by a cross-action, if he suffers."

This instrument then is not, in my opinion, a covenant not to sue. And if it were it is made with one partner, and could only mean a covenant not to sue him. In *Couch vs. Mills*, above referred to, Chief Justice NELSON said where it is "only a covenant not to sue, it is well settled that in the case of two or more joint obligors it constitutes no defense to the action." If it be no defense for the other joint obligors, there is as little reason for its being a defense for the other partners.

An unconditional release to one joint obligor or one partner is a release to all, for each obligor and each partner owes

the whole debt. It is a partnership debt, owed by each partner, and all the partners jointly, if that term may be used in that connection. This instrument is not a release. If it had been so intended surely more apt words to show that intention would have been used. It could not have been intended as a release, for that would have discharged the other partners. This the creditor and Thrasher are presumed to have known, and yet there is an express reservation of the right to demand the unpaid portion of the debt from the others. Courts will not be quick to construe an instrument into a release where a part only of a debt is paid, and all the debtors solvent, unless it plainly appears to be the intention of the parties. If I am right on the question that this is not a covenant not to sue, but rather the right to sue was from the whole scope of the instrument in the legal contemplation of the parties and impliedly reserved, would it not be a legal absurdity to say it is a release. It is a contradiction in terms to call that a release from a debt which admits a continuing right to sue for that debt. The Code provides that a "bond to indemnify the debtor against his own debt" is equivalent to a release. I do not think this instrument comes within either branch of that provision. That Thrasher may have ultimate rights under this instrument I do not deny, but in the language of Chief Justice NELSON, quoted above, they may be protected "by a cross-action if he suffer."

The provisions of the Code on this question make no new principle. They mean just what they meant in the common law authorities whence they were taken, and I am satisfied that the construction the majority of this Court has given them is supported by a strong current of decisions made by the most eminent Judges.

WARNER, Chief Justice, dissenting.

The plaintiff brought his action against the defendants, as partners, using the name and style of J. B. O'Neil, Foster & Company, said partnership being composed of O'Neil, Foster and J. J. Thrasher, on a written obligation, to pay the plain-

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tiff the sum of \$567 31, dated 27th December, 1867. The defendants pleaded a release by the plaintiff, of John J. Thrasher, one of the joint contracting parties, dated 7th of August, 1869, in the following words: "Received of John J. Thrasher, \$300 00, paid by him to be credited on a certain written obligation of O'Neil, Foster & Company, to Lemuel Kendrick, dated 27th December, 1867, and now in the hands of Hillyer & Brother for collection, and in consideration of said sum, I, as agent for said Kendrick, do hereby covenant and agree that the other parties shall and will duly pay the balance due on said obligation, without further costs or detriment to said Thrasher. (Signed) George Kendrick."

There was evidence offered at the trial as to the fact of George Kendrick being the agent of the plaintiff. The jury, under the charge of the Court, found a verdict for the defendant. The Court charged the jury, "that the legal effect of the instrument above set forth, was to release the said Thrasher from his liability on the instrument sued on, and that the release of Thrasher operated in law as a release of the other obligors." A motion was made for a new trial on the ground of error in the charge of the Court to the jury, which was overruled, and the plaintiff excepted.

The 2810th and 2811th sections of the Code declare, "that a covenant never to sue is equivalent to a release; so, also, a bond to indemnify the debtor against his own debt. A release sometimes results as an operation of law, as when a creditor releases another who is bound jointly with, or primarily to the debtor, or accepts from the debtor a higher security for the same debt, not intended to be collateral thereto." The debt specified in the original obligation was a debt due by Thrasher as one of the partners of J. B. O'Neil, Foster & Company. The plaintiff, by his agent, covenanted and agreed, in consideration of \$300 00, paid to him by Thrasher, that the other parties to the obligation should and would duly pay the balance due thereon without further costs or *detriment* to said Thrasher. Although the word release is not used in the covenant of the plaintiff, still, the legal effect of the words em-

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ployed will operate as a release of Thrasher. The covenant that the other parties *shall pay* the balance due on the obligation is equivalent to saying that Thrasher *shall not*, besides, the plaintiff covenants, not only that the other parties shall pay the balance due on the obligation, but that they shall do so without further costs or *detriment* to said Thrasher, thereby, in legal effect, indemnifying Thrasher against the payment of his own debt, or any costs that might accrue in collecting the same. "Without detriment," means without loss, damage, injury or harm. If the plaintiff could enforce the payment of the balance due on the co-partnership obligation against Thrasher by suit, or otherwise, he could subject him to loss, damage and costs, which he had expressly agreed and covenanted that he would not do. When a bond is required by law, an undertaking in writing, without seal, is sufficient: Code, section 4. The legal proposition that Thrasher was released from the payment of the balance due on the obligation and indemnified against the payment thereof by the plaintiffs' covenant, is too plain for discussion, under the provisions of the Code before cited.

In my judgment, there was no error in the charge of the Court to the jury, and that the judgment of the Court below should be affirmed.

JOHN MCEL RATH, plaintiff in error, vs. SALLIE B. HALEY
et al., defendants in error.

1. In 1862, Roath purchased lot number forty-five, in the city of Augusta, with a front of sixty feet, and running from Ellis to Greene street, and was residing on it when, in March, 1866, he purchased lot number forty-four, a vacant lot adjacent to number forty-five, of the same front and running the same length as number forty-five. He used part of lot forty-four as a flower garden, and part as a vegetable garden. There was a fence around both lots, and a fence divided them when Roath purchased forty-five, and the evidence is conflicting as to the time when the dividing fence was taken down by Roath, whether it was before or after the execution of his will. In September, 1866, Roath made his

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will, and in one item "devised and bequeathed my house and lot on Ellis street, in the city of Augusta, where I now reside, to my wife for her natural life, and after her death, to my two nieces, M. and S. B. Crocker." In another item, he gave all the balance of his estate, real and personal, to his wife, absolutely. Testator died in November, 1867:

Held, That the acts and sayings of Roath, which go to show that, at the time of the execution of the will, he considered and treated the two lots as one and as constituting the house and lot where he then resided, are competent as evidence in behalf of the remaindermen in an action of ejectment brought after the death of the wife of Roath to recover lot number forty-four.

2. The widow of Roath had built a house on forty-five, had married again and died, and the action was against her second husband. On the trial, one of the plaintiffs testified, by interrogatories, that the widow of Roath, some time after the building of the house, said to her, (plaintiff,) "She was a fool for building the house, and if she had her way she would tear it down, if she could get her money back." And further testified, over defendant's objection, "She also said she had been to see her lawyers, Barnes & Cumming, and they told her * * * she offered, if we would do this, to give us up the house on Ellis street, but this was never done:"

Held, That it was error to admit that portion of the testimony objected to by defendant. If it was an offer of compromise, it was illegal testimony. If otherwise admissible, the whole of what she said should have been stated, and if stated, should have gone to the jury. Where the evidence is conflicting, and illegal testimony be admitted which might, and probably did, injure the party objecting, a new trial will be granted.

Will. Evidence. New trial. Offers of compromise. Before Judge TWIGGS. Richmond Superior Court. October Term, 1872.

Sallie B. Haley, formerly Sallie B. Crocker, and Mabel E. Crocker, brought complaint against John McElrath for lots numbers forty-four and forty-five, in sub-divisions of the city of Augusta, as found on map prepared by William Phillips. The record fails to disclose the plea filed by the defendant.

The evidence made the following case: On July 1st, 1862, David L. Roath purchased from W. J. Reed lot number forty-five, in the city of Augusta, with the improvements thereon, fronting on Ellis street sixty feet, and running back to Greene

street, of the same width. Roath resided on this lot until his death, in the fall of 1867. On March 22d, 1866, he purchased from Henry H. Cumming lot number forty-four, fronting sixty feet on Ellis street, running back of the same width to Greene street, and adjoining on the west lot number forty-five. At the time of this second purchase, there was a dividing fence between the two lots. The evidence is conflicting as to when this fence to the rear of the house on number forty-five was removed. Roath used the front portion of this last purchase as a flower garden, and the back portion as a vegetable garden. On September 22d, 1866, he made his will, containing the following provisions:

“Item 1st. I devise and bequeath my house and lot on Ellis street, in the city of Augusta, where I now reside, to my dear wife, Frances A., for her natural life, and after her death to my two nieces, Mabel E. and Sallie B. Crocker, to be held in trust for my two nieces during their lives.

“2d. My accounts as guardian of my nieces, Mabel E. and Sallie B. Crocker, show a considerable indebtedness from them to me. I discharge and release this indebtedness entirely.

“3d. All the rest and residue of my estate of every kind and description, real and personal and mixed, notes, bonds, money and accounts I give, devise and bequeath to my said wife, Frances A., absolutely and forever.

“4th. I direct that there be no inventory or appraisement of my estate made, and expressly relieve my executrix from the necessity of making annual or any other returns to the Court of Ordinary or to any other Court.

“5th. I appoint my said wife, Frances A. Roath, executrix of this my last will and testament.”

Sallie B. Crocker married E. W. Haley, on October 10th, 1868. Mrs. Roath built a house on lot number forty-four during the year 1868. She spent in improvements over \$2,400 00, which amount she realized from the sale of railroad stock. After she completed the house she married the defendant. She died on June 10th, 1871.

The plaintiffs sought to show by the acts and declarations

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of the testator that at the time of the execution of his will he considered lots numbers forty-four and forty-five as together constituting one lot, to-wit, the lot whereon he then resided; that he treated them as one lot, and that in all the plans for the future, in connection with his house, he was governed by this idea. All of this testimony was objected to, the objection was overruled, and the defendant excepted.

In answer to 9th interrogatory propounded to Sallie B. Haley, she stated that Mrs. Roath "remarked to her, some time after she had built the house on Greene street, that she was a fool for building it; that if she had her way she would tear it down, if she could only get her money back. She also said that she had been to see her lawyers, Barnes & Cumming, and they told her * * * She offered, if we would do this, to give up the house on Ellis street, but this was never done."

The defendant objected to the last two sentences of this answer. The objection was overruled and the defendant excepted.

The jury returned a verdict for the plaintiffs. Whereupon, the defendant moved for a new trial upon the following, among other grounds:

1st. Because the verdict is contrary to the law and the evidence.

2d. Because the Court overruled the objection of defendant to the admissibility of other parol testimony than what was necessary to ascertain and fix the lot in dispute, the objection being that no other parol testimony was admissible in this case to aid in the construction of the will.

3d. Because the Court erred in overruling the objection of defendant to the admissibility of the following testimony, contained in the answers of Mrs. Haley to 8th direct interrogatory addressed to her, to-wit:

"She also said she had been to see her lawyers, Barnes & Cumming, and they told her * * * She offered, if we would do this, to give up the house on Ellis street, but this was never done;" and allowed said testimony to go to the jury,

the ground of objection being that said testimony was irrelevant, and improper to be considered by the jury.

The motion was overruled, and the defendant excepted upon each of the grounds aforesaid.

BARNES & CUMMING, for plaintiff in error.

FRANK H. MILLER, for defendants.

TRIPPE, Judge.

1. The defendant surrendered lot number forty-five and the contest was over lot number forty-four. The will gave the house and lot on which he resided at the time of its execution, to his wife for life, with the remainder to defendants in error, the plaintiffs in the action of ejectment. The defendant below objected to the admission of any parol evidence to show that the house and lot on which testator resided were words intended by him to include or to convey more than lot number forty-five. The plaintiffs claimed that testator intended to give both lots—his whole place; that he bought lot forty-four with the purpose of making it a part of his homestead; that he treated it and considered it as such, using it as a flower and vegetable garden, ornamental and useful to his home, and declared his intention of still further making it an ornament, by erecting a fountain on it, etc. Was all this competent testimony? In this particular case, I consider the great test to be, whether the testator used the word “lot” with reference to the application of it to the artificial divisions of the city of Augusta, as distinguished on the map, or by the city survey, into lots by numbers and size; or did he use it as designating the place on which he lived, as defined by his deeds or title, and his inclosure. Mr. Greenleaf says: “If the language of the instrument is applicable to several persons—to several parcels of land—to several species of goods—to several monuments or boundaries—to several writings, or the terms be vague and general—in all these, and the like cases, parol evidence is admissible of any extrinsic circumstances

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tending to show what person or persons, or *what things* were intended by the party, or to ascertain his meaning in any other respect:" 1 Greenleaf's Evidence, section 288. This Court, in *Billingslea vs. Moore*, 14 Georgia, 374, says, "The general rule is that parol testimony is inadmissible to explain a will, except for the purpose of proving the circumstances surrounding the testator; that is to say, his situation in his relation to persons and things about him," and in 20 Georgia, 689: "Parol evidence is admissible for the purpose of applying a description to its subjects," etc. A Court and jury, in the effort to discover the intention of a testator, may, as it were, put themselves in his place, and thus ascertain how the terms of the instrument affect the property or subject matter: 15 Pick., 400; 1 N. & Mc., 534. Upon the question of the admissibility of parol evidence to explain ambiguities, there is much confusion, and, also, contradiction in the authorities. When most of them were written or pronounced, a distinction was drawn between a patent and a latent ambiguity, the latter being explainable and the former not. And yet in numberless decisions the distinction was so refined or disregarded as to almost make the line undistinguishable, or to set aside the rule. By our statutory provisions the rule is totally abolished.

But to revert to the test which was stated above. Has the word "lot," as used in this will, such a fixed, specific meaning, to be ascertained or controlled by maps, charts or surveys, that it cannot be permitted to be explained to mean anything but a certain number, to-wit: city lot, known in the survey as number forty-five? It is often used in common discourse by one referring to his *home*, as meaning the *place* or premises on which he lives, without reference to where the surveyor's chain was run, except as it may have marked the outside boundaries or limits of what constitutes those premises. If one buys two city lots, with one inclosure around all, pulls down the dividing fence, uses both as parts of one homestead, considers the one last purchased as protecting his *home* against too close invasion, by its being liable to be built on, makes it a part of

his yard and gardens, the farthest part of its front not being, probably, in this case, more than sixty or seventy feet from his house, we do not think it would be doing violence to any rule of law to allow such facts, and all others tending to show that, in a devise of the house and lot on which such owner lived, it was intended by him to give all that constituted his house to the object of his bounty.

2. The portion of Mrs. Haley's interrogatories objected to by defendant was improperly admitted in evidence. There was evidently a portion of her answer stricken out by the Court. What that was, we do not know. It was certainly a part of the sayings of Mrs. McElrath, and it was offered against her title as admissions, for instance. If part of what she said was admitted, all should have been admitted. But if this were not so, in its present form, it leaves a blank which opens the matter to conjecture, and a damaging conjecture, against defendant. For, naturally, one would suppose it was a direction from her attorney that she did not have full title, and that the proposition to "do this," was to give up one right to make good another claim that was not good or valid, and thus an impression was, in all probability, made on the mind of the jury that defendant's counsel had advised against the validity of his client's claim. Further, if Mrs. McElrath (then Roath) made this statement as an offer of compromise, it was not admissible. Section 3736 of the Code says: "Admissions or propositions, made with a view to a compromise, are not proper evidence." This enlarges the common law rule, which did not exclude the admission of distinct facts. When testimony has illegally gone to the jury which might, and probably did, injure the party objecting, it is a ground for a new trial.

Judgment reversed and a new trial granted.

Johnson *et al.* vs. Wright *et al.*

JOHN DOE *ex dem.*, HARRIET JOHNSON, formerly HARRIET TAFF *et al.*, plaintiffs in error, vs. RICHARD ROE, casual ejector, and AUGUSTUS R. WRIGHT *et al.*, tenants in possession, defendants in error.

1. Where the issue upon trial was whether a judgment of a Court declaring a draw in a land lottery by a minor orphan fraudulent, had been obtained by fraud, it was error in the Court to charge, "that the fact that Kirkpatrick, the informer, designated or suggested that Taff was a suitable person to be, and should be, appointed guardian *ad litem*, and that Taff failed to appear and defend the case, were both strong circumstances of fraud; that it was not to be presumed that Kirkpatrick, the informer, who was seeking to condemn the draw as a fraudulent draw, would designate a person as guardian *ad litem*, who would honestly and fairly defend the case and protect the rights of the orphan." (R.)
2. Where a Court had jurisdiction of the person and the subject matter, in the manner prescribed by law, although the proceedings may have been irregular, the judgment would not be void; *aliter*, if the Court had jurisdiction of the subject matter, but not of the person. (R.)

Charge of Court. Jurisdiction. Judgment. Before Judge PARROTT. Bartow Superior Court. September Term, 1869.

For the facts of this case, see the decision.

WARREN AKIN; D. A. WALKER, for plaintiff in error.

JAMES MILNER; UNDERWOOD & ROWELL, by R. F. FOUCHE, for defendants.

WARNER, Chief Justice.

1. This was an action of ejectment, brought by the plaintiff against the defendants, to recover the possession of lot of land number one hundred and twenty-four, in the fifth district of Cass county. The action was commenced on the 7th of January, 1852. This is the third time this case has been before this Court. On the last trial thereof, the jury found a verdict for the plaintiff. A motion was made for a new trial on the several grounds set forth therein, which was granted by

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the Court, and the plaintiff excepted. It appears from the evidence in the record, that Harriet Taff, as the orphan of William B. Taff, drew the lot of land in dispute, which was granted to her by the State, on the 28th of January, 1833; that on the 14th of March, 1834, a *scire facias* was issued in the name of the Governor, on the information of one Kirkpatrick, alleging that said draw in the land lottery was fraudulent, on the ground that the said Harriet Taff had not resided in the State of Georgia three years immediately preceding the 1st day of January, 1832, and did not reside in said State on the 21st day of December, 1830, and requiring her, the said Harriet Taff, to appear before the Superior Court of Cass county and show cause why said return and draw should not be adjudged fraudulent, and the grant to her of the lot by the State annulled. The entry on the back of the *scire facias* is as follows: "Served the defendant, Harriet Taff, by serving her guardian, John W. Taff, with a copy of the within writ. August 27th, 1834. (Signed) C. F. Hemmingway, deputy sheriff."

On the trial of the *scire facias* the lot was condemned as fraudulent, judgment entered up to that effect, and the defendants in the present action derive their title to the lot of land under that judgment as purchasers thereof. The plaintiff offered in evidence the common law docket of 1834, showing the entry of default by defendant in *scire facias*, and also, showing the entry of "John W. Taff; guardian *ad litem*." John W. Hooper, who was the presiding Judge of the Court, testified that the reason that John W. Taff was appointed guardian *ad litem*, was that Kirkpatrick, the informer, stated to the Court that John W. Taff was the guardian of Harriet in the county in which she resided, but it did not appear that he was her guardian other than by the statement of Kirkpatrick, the informer. John W. Taff was not present when appointed guardian *ad litem*, did not appear, and witness never saw him, and has no knowledge of his acceptance of the appointment. William Ezzard testified, that he was the attorney for Kirkpatrick, the informer, at the time of the trial of

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the *scire facias*; that John W. Taff was appointed guardian *ad litem* at the suggestion of Kirkpatrick; don't think he was present, and has no recollection of his appearance for Harriet or of his acceptance of the trust, or that he had any notice of his appointment, and believes he did not accept; there was no defense made on the trial of the case; thinks service of the *scire facias* was made on Taff before he was appointed guardian *ad litem*. There is no pretence that Harriet was not entitled to a draw in the land lottery, on the ground that she did not reside in the State—the evidence is full and satisfactory upon that point; one of the witnesses states that she raised Harriet, that she never was out of the State until she married. The Court charged the jury on the trial, amongst other things, “that the fact that Kirkpatrick, the informer, designated or suggested that John W. Taff was a suitable person to be, and should be, appointed guardian *ad litem*, and that Taff failed to appear and defend the case, were both strong circumstances of fraud; that it was not to be presumed that Kirkpatrick, the informer, who was seeking to condemn the draw as a fraudulent draw, would designate a person as guardian *ad litem* who would honestly and fairly defend the case and protect the rights of the orphan.” This charge of the Court was error, according to the provisions of the 3183d section of the Code and the repeated rulings of this Court, and we are constrained to affirm the judgment of the Court below in granting the new trial. In our judgment, this case was not fairly submitted to the jury by the Court below, in view of the facts disclosed in the record.

The main controlling question in the case was whether the Court which rendered the judgment on the *scire facias*, condemning the land as having been fraudulently drawn, had jurisdiction of the person of Harriet Taff, in the manner prescribed by law. If it had jurisdiction of the person and the subject matter in the manner prescribed by law, although the proceedings of the Court may have been irregular, the judgment would not be void; but if the Court did have jurisdiction of the subject matter, and had no jurisdiction of *the person*

of the minor orphan drawer, as prescribed by law, at the time the judgment was rendered, then the judgment was null and void, and that was *the* point in the case. The 27th section of the Act of 1830, providing for the condemnation of fraudulent draws in the land lottery, declares, that the service of the *scire facias* may be effected by any sheriff of any county in the State by leaving a copy thereof with the person *named as defendant*, or at his or her notorious place of abode. Harriet Taff is named as *the defendant* in the *scire facias*, and *no other person*. Did the evidence show that a copy of the *scire facias* had been left by the sheriff with Harriet Taff, the person named as defendant therein, or left at her notorious place of abode, as required by the statute, so as to have given the Court jurisdiction of her person in that proceeding to condemn her draw as fraudulent? In my individual opinion, the service of the *scire facias* on John W. Taff, who is said by the sheriff in his return to be her guardian, is not service upon *the person named as defendant in the scire facias*, even if he was her guardian. But was John W. Taff her guardian, or was he a mere man of straw? The Act of 1830 expressly provides, "that no return made by, or on behalf of any orphan or orphans, shall be pronounced fraudulent until his or their legal guardian shall have been made *a party to the scire facias*, or other discreet person appointed by the Court in which the case is tried, to defend the case for the said orphan or orphans." If such a person as John W. Taff did, in fact, exist, and if, in fact, he was her legal guardian, was he ever made *a party to the scire facias*? If not, was any discreet person appointed by the Court to defend the case for the orphan when the case was tried, and was such person *notified* of his appointment, and did he *accept* the same? In short, does the evidence show that the orphan drawer of this lot of land had any *notice* of that proceeding by *scire facias* to condemn it as fraudulent, and was she represented before the Court, so as to be bound by that judgment?

2. If the Court had jurisdiction of her *person*, as required by law, then the judgment was not void, though the proceed-

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ings may have been irregular; but if the Court did not obtain jurisdiction of her person, in that proceeding, in the manner prescribed by law, then the judgment was null and void, and the title to the land is still in her as the drawer thereof, and not in the defendants who claim to derive their title under that judgment. The question presented in this case, is not whether the defendants are *bona fide* purchasers of the land, but the question is, whether they have any title to the land, and that is the view which this Court took of it when the case was before it on a former occasion: See *Johnson and wife vs. Wright et al.*, 27 Georgia Reports, 555.

Let the judgment of the Court below be affirmed.

S. M. SIESEL & BROTHER, plaintiffs in error, vs. WEST HARRIS, defendant in error.

1. Although a plea of usury does not "set forth the sum upon which it was paid, or to be paid, the time when the contract was made, where payable, and the amount of usury agreed upon," etc, as required by section 3419th of the Code, yet if it does state the rate per cent. of interest which was agreed to be paid, and that the usury in the contract sued on amounts to as much as is due on the contract, and no demurrer or exception is taken to the plea, it is error in the Court to charge the jury that because the plea does not set forth the foregoing specifications they cannot consider it.
2. Money was loaned at usurious rates to a firm composed of A, B and C, and a mortgage given by the borrowers on their stock of goods to secure the debt. The mortgage was foreclosed, and the *fi. fa.* was about being levied on the goods, when the mortgagors, insisting upon indulgence being given them, and threatening to raise the question of usury against the debt, it was agreed that the mortgage should be given up, a portion of the debt be paid in cash and the balance in three installments. The notes of A and B, who had formed a new partnership, (C having withdrawn and left the State,) were given for these installments. One of these notes being paid, suit is brought on the other two:

Held, That the contracts sued on are not purged of usury.

Usury. Pleading. Before Judge COLE. Bibb Superior Court. April Term, 1872.

Siesel & Brother vs. Harris.

West Harris brought complaint against Siesel & Brother, upon two promissory notes, dated December 27th, 1867, payable to plaintiff or bearer, each for the sum of \$450 00, one due April 15th, 1868, and the other October 15th, 1868. On the last note there were two credits, bearing date December 28th, 1867, one for \$216 77, the other for \$62 50.

The defendants pleaded as follows:

That they were engaged in business at Cuthbert, Georgia, with one Jacob Miers, under the firm name of Siesel & Miers, the said Miers being the partner residing at Cuthbert and attending to the business there; that while so engaged and employed, he, the said Miers, without the knowledge or consent of these defendants, and without these defendants having any interest whatever in the transaction, executed and delivered to the plaintiff a mortgage deed, conveying to him all the stock of goods in the dry goods store of Siesel & Miers, in Cuthbert, to secure the payment of one note of \$1,500 00, payable to plaintiff, and another note for \$405 00, bearing date December 16th, 1867, payable to James M. Harris, and due at the date thereof. That on December 27th, 1867, plaintiff foreclosed said mortgage, and had the execution issuing therefrom levied upon the stock of goods of Siesel & Miers, and then, for the first time, these defendants had positive knowledge of the existence of said debt and mortgage; that defendants being pressed by said levy, and being ignorant of the consideration of said notes, and believing that they were bound for said debt, because the said Miers had executed said notes and mortgage, and being anxious to save their mercantile credit and honor, did enter into a settlement with the plaintiff, by which they paid him in cash \$500, and executed and delivered to him their three notes, one for \$500 00, due at sixty days, one for \$450 00, due April 15th, 1868, and one for a like amount, due October 15th, 1868; that defendants afterwards paid off the note for \$500 00, and made the payments credited on one of the notes sued on, the day it was given. That defendants have since ascertained that said mortgage was given by Miers to secure an individ-

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ual debt of his own, in which these defendants had no interest whatever; that the indebtedness was created for money borrowed by Miers, at usurious rates of interest, for his own private use; that the payments made by these defendants upon said debt, together constitute more than the principal sum borrowed by Miers, with legal interest thereon; that defendants, if liable at all upon said debt, have fully paid off and discharged that liability, and now owes the plaintiff nothing.

For further plea, the defendants say that plaintiff was indebted to them at the time of the commencement of said action, and is still indebted to them in the sum of \$1,278 50, for so much money paid to plaintiff under a mistake, and to which he was not justly and legally entitled. Wherefore defendants pray that they may have judgment against the plaintiff for said sum of money.

For further plea, the defendants say that the money borrowed was at the rates of three per cent. per month, and five per cent. per month, and that the usury in said notes amounts to as much as the sum due upon said notes.

The evidence discloses the fact that no actual levy of the mortgage execution was made, but that the settlement set forth in the plea was effected under threats of such a levy. As to whether the usury was expressly embraced in the settlement, the testimony is conflicting. Miers left the State, and is not a member of defendant's firm. The remainder of the evidence being unnecessary to an understanding of the decision, is omitted.

The Court charged the jury as follows:

1st. "The plaintiff having put in evidence the notes of the defendants, is entitled to recover the amount of those notes, less the credits thereon, with legal interest, unless the defendants have, by the proof, made out a good defense, or shown some reason, valid in law, why the plaintiff should not recover.

2d. "The defense set up is, that Miers, one of the partners, borrowed money from the plaintiff, not for the use of the firm, but on his own private account, giving the firm notes therefor;

but I charge you, gentlemen, that all the partners are bound by the acts of any one, within the legitimate business of the partnership, because any partner has a right to examine into the affairs of the firm, and unless otherwise agreed, to have joint possession of its effects, to collect and apply its assets, to contract or otherwise bind the firm in matters connected with the business, and to execute any writing or bond in the course of the business, and a person lending money to a partner for the firm, is not bound to see to its application, if the money was lent for the use of the firm. The plaintiff is, therefore, entitled to recover upon a contract made by one of the partners for the use of the firm, against the others, unless there is fraud in the transaction. You will look into the evidence and see if there was any fraud in the transaction between Miers and the plaintiff. Fraud must be proven; it is not to be presumed. But I charge you, that it does not require as strong circumstances to prove fraud as in other cases. Slight circumstances may be sufficient to prove the existence of fraud. If there was a fraudulent combination between the plaintiff and Miers, by which the Siesels were injured, and that fact did not come to the knowledge of the Siesels until after the giving of these notes, and that fact has been proven to your satisfaction, then the plaintiff cannot recover.

3d. "The defendants also plead that Miers borrowed money from the plaintiff at usurious rates of interest, and that, if liable at all, they are only liable for the money borrowed, with legal interest thereon, but I charge you, gentlemen, that the defendants must set forth in their plea, the sum upon which the usury was paid or to be paid, the time when the contract was made, and the amount of usury agreed upon, taken or reserved. And unless they have done this, you cannot consider the plea of usury at all.

4th. "I charge you, gentlemen, that although the note and mortgage given by Siesel & Miers may have been affected by usury, yet, if you believe from the evidence that the parties agreed that the same should be taken up, and the usury and all other matter in dispute between them settled, and in con-

Siesel & Brother vs. Harris.

sideration thereof the notes sued on extending the time of payment should be given by S. M. Siesel & Brother, then there has been a novation of the contract. In that case, these notes rest on a good consideration and are valid. If you believe from the evidence that such a settlement was made, covering all matters of controversy between the parties, including the usury, then I charge you that the question of usury, and of all the matters in dispute between them, were merged in this settlement, and the usury existing in the former contract cannot be set up against these notes. If, however, you should find from the evidence that there was fraud in the transaction between the plaintiff and Miers, and that the defendants, S. M. Siesel & Brother, did not discover the same until after they had given their said notes, then I charge you that defendants are not foreclosed from setting up that fraud now."

The jury returned a verdict in favor of the plaintiff for \$620 73, with interest and costs of suit. Whereupon, the defendants moved for a new trial, upon the grounds that the verdict was contrary to evidence and to law, and because the Court erred in the second, third and fourth divisions of the charge.

The motion was overruled, and the defendants excepted.

LYON & IRVIN, for plaintiffs in error.

C. B. WOOTEN ; S. HALL, by JOHN RUTHERFORD, for defendant.

TRIPPE, Judge.

1. The plaintiff below, on the trial, did not except or demur to the plea of defendant, on the ground that it was not as specific in its details as section 3419 of the Code requires. The evidence on the question of usury was all admitted without objection; the whole argument to the jury was on that evidence, indeed, the plea of usury was the only defense insisted on, and it was error in the Court to charge the jury that because the plea did not contain all the specifications the law

required, they could not consider it. The plea did state the rate per cent. of interest which was agreed to be paid, and that the usury in the notes sued on was as much as the amount of the notes. This may have been a defective plea, and a demurrer for want of being full enough as to all the facts required by the Code, might have been sustained. But it was too late to raise this objection after all the evidence was introduced and argument heard, by asking the Court to charge the jury that they could not consider the plea. If the plaintiff would not have been bound by a waiver of a plea altogether, he certainly could bind himself by waiving a plea defective only in not being full in all the details entering into it. His action in this case was as strong a waiver as if it had been in writing, and it would be giving a party an unjust advantage to permit him to raise such a point by a request for the Court so to charge. See 39 *Georgia*, 708.

2. The doctrine of novation insisted on by the counsel for defendant in error does not apply in this case. The question is, was the contract purged of the usury. We do not think it was. Two of the original three debtors made the new notes, (the third debtor having left the State, insolvent) the notes were given to the same party who held them before, and the full amount of the claim, usury and all, was included in the new contract. It is true the mortgage was given up; but if that were sufficient to purge a contract of usury, it would open the door so that the whole law of usury could have been set aside, if the lender ever demanded and took a mortgage as a security and afterwards, upon agreement, canceled it.

Section 2025 of the Code says: "The effect of usury is to annul and make void the contract for the usury; the lender having the right to recover the principal sum loaned, with interest." If, by the statute, that portion of the contract in excess of the lawful rate of interest is annulled and made void, the parties to that contract cannot make it valid and binding. The substitution by the parties of a new note or bond for one affected by usury will not avail: 3 Esp. 22; 8 T. R., 390.

If the parties agree that the bond or note shall be destroyed,

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and that the borrower should give a new one to a third party to whom the lender owed the same amount, and it be done, the new obligation was held good: 7 Mod., 118. So where a promissory note, tainted with usury, was transferred to a third party, who knew nothing of the usury, for a valuable consideration, and the maker of the note afterwards gave that party a bond for it, such bond was held valid: 8 T. R., 390. But if that holder, upon being informed of the usury, take a new bill in lieu of it, drawn by one of the parties to the original usury and accepted by a third person for the accommodation of the other party, he cannot maintain an action against the acceptor: 2 B. & A., 588.

Comyn on Usury, page 185, lays down the general rule, that when the original parties to the usury are parties to the new contract or security, and it be given in substitution of the old one, such new contract or security will be void. If when the new security is given, the usury is deducted, and the new promise is to pay only the principal with lawful interest, that promise, according to all the authorities, is valid. But as we have said, in this case the present parties to this contract were original parties to the first contract, and it is given for the unpaid balance of that contract, usury included.

Judgment reversed.

APPENDIX.

On the 25th of April, during the January Term, 1873, of the Court, the death of WILLIAM DOUGHERTY, Esq., was announced by Warren Akin, Esq., who, at the same time, moved the appointment of a committee to report appropriate commemorative resolutions.

The Court appointed the following committee: Hon. Warren Akin, Hon. N. J. Hammond, Hon. P. L. Mynatt, Hon. John Collier, Hon. William Ezzard.

On June 18th, during the same term, the following report was made:

The committee appointed to report suitable resolutions as to, our late brother William Dougherty, beg leave to submit the following:

He was born in Clarke county, Georgia, on the 14th of April, 1805. He finished his education at Franklin College (now the State University of Georgia,) graduating in the class of 1827. He was at once admitted to the bar and settled to practice law in Troup county, Georgia, while yet the track of the departing Indian was fresh in her soil, and the surveyor's chain was dividing her territory for homes for the white man.

He died while on a visit to New York, on the 21st of October, 1872, in the sixty-eighth year of his age.

A memoir of his life would cover so much space that we decline to enter upon it, and notice only the salient points in his character.

Politics had no charm for him. With the exception of a short term as a member of the General Assembly from Troup county, he never held any official position.

His personal popularity gave him a right to have expected any preferment which he might have asked. His rare intel-

lectual endowment, his cultivation and his great integrity of character, well fitted him for high and commanding positions. To him political preferment would have brought national renown. But while he ever entertained decided political convictions and freely expressed them, while he felt a deep concern for the people and a devotion to constitutional government, he allowed nothing to swerve him from his main purpose. He promoted every political good, and while he deserved all, would accept no political reward. His sole purpose was to be a lawyer. He studied thoroughly the fundamental principles of the law, and stored his mind with the learning of those eminent as jurists. He made his client's case his own, and threw into its management an earnestness and ability which dispelled all fear of injustice and all doubt of success. And yet such was his frank and manly bearing that his adversary admired his fairness as much as he feared his power.

He always mastered the facts of his case—he loved right and abhorred wrong. Therefore, as an advocate, he was always clear, and on occasions was most naturally and therefore most splendidly eloquent. In the defense of threatened innocence and of betrayed confidence he took possession of juries, commanded the respect of Judges and elicited the sympathy and applause of his hearers. He used none of the arts of the orator. His manner was so simple and natural, his words fell so readily and fluently that truth and justice seemed to be speaking with their own tongues, and he seemed unconscious of his power, and his audience never suspected that he aimed at anything but right. His success was so marked that his field of operations became very extensive; from New York to New Orleans he was sought for as a lawyer, and even at his advanced age he enjoyed a very heavy and lucrative practice.

Mr. Dougherty was eminently social. He never drank intoxicating liquors, never indulged in games, even the most innocent, had none of the smaller vices to which the genial and sociable are so generally addicted. Yet so kind was his nature, so hearty his greeting and so pleasant was his conver-

sation that he was the centre figure of every party in which he was found. The common people talked to him of their farms, their financial ventures, their neighborhood interests, and of their domestic affairs, and each felt that he was his friend, who shared his hopes, his sorrows and his joys.

Members of the bar would leave the Court-room where they had been crushed by his power, and forget their bruises while they listened to his anecdotes and joined in his hearty laugh.

The young lawyer never found him too busy to listen to his small cases and great troubles, and had them made clear and himself made happy by his advice and encouragement. The citizens all gathered about the hotel at which he stopped, and felt that his company was the chief pleasure of the Court week.

These good qualities shone out most brilliantly and beautifully in his home circle. Towards his children, in their mature manhood and womanhood, he was as tender as when they climbed upon his knees and amused him with their innocent prattle; and towards his wife he was, in his old age, as much at heart and in manner a "sweet-heart" as when he wooed and won her affections. He was the second of three remarkable brothers. For strength and comeliness of manhood, for a roundness of intellectual force, moral excellence and social purity, no family ever produced a more evenly balanced and noticeable trio. Each was a great lawyer, and gave character and dignity to the bar of Georgia, and of the South. They have all passed away, and in their deaths every household has lost three worthy examples; truth has lost three noble defenders; every lawyer has lost three genial companions; the temple of justice has lost three most powerful advocates, and our country has lost three most patriotic citizens.

This Court has heretofore commemorated the virtues of Charles, our brethren across the Chattahoochee have made fit offering to the memory of Robert, and we, lastly, in the name of the bar of Georgia, ask to place upon your minutes this feeble expression of what we feel towards our departed brother William Dougherty.

His life was full of labors, his death full of peace. Let us follow his example that we may reap his reward.

Resolved, That in the death of WILLIAM DOUGHERTY the bar of Georgia has lost one of its ablest, truest and noblest members.

Resolved, That this report and accompanying response by the bench be spread upon the minutes of this Court, and that its clerk furnish a copy of them to the family of the deceased.

(Signed)

WARREN AKIN, *Chairman*.
N. J. HAMMOND,
P. L. MYNATT,
JOHN COLLIER,
WILLIAM EZZARD.

WARNER, Chief Justice, in behalf of the Court, responded as follows:

The death of William Dougherty has not only cast a gloom over this Court-room, but throughout the limits of this State. Who is there that did not know him either personally or by reputation? Who knew him but to love and admire his genial good nature, and to respect his great ability as a lawyer and advocate? Gifted by nature with a fine person and attractive manners, he impressed any one at first sight as a man of no ordinary capacity; but when he came before the Courts to maintain the cause of his clients, his intellectual power and persuasive eloquence was acknowledged by all. As a lawyer and advocate he had but few equals and no superiors. Abandoning politics, he devoted his whole life to the profession of his choice, and his professional brethren throughout the State were proud of him. Possessing a large share of good practical common sense, a clear discriminating mind, united with an untiring energy, he was a most formidable antagonist in any cause in the judicial forum. Whoever came in contact with him there that did not feel and appreciate the strength, force and logic of his great intellectual power? The records of this Court, from its organization up to the time of his death, will show the numerous cases in which he was retained as counsel, in all of which he performed his duty with distinguished ability. Discarding all official honors he was emphatically, what in his unostentatious simplicity he desired to

be—William Dougherty, the eminent lawyer and advocate. Generous and manly in his intercourse with his fellow men and professional brethren, he was one of nature's noblemen. In the rough contests of life, he never forgot that he was a gentleman. Of his ardent, strong, constant personal attachment to his friends, I will not now trust myself to speak. When shall we look upon his like again? His voice will be heard here no more forever, he has fought his last intellectual battle in this forum of his native State which he loved so well, and gone to his final rest.

Let the report and resolutions of the committee be entered on the minutes of the Court, as a perpetual memorial of our respect and affection for our lamented brother when living, and of our sincere, heartfelt sorrow for his death, and a copy thereof be furnished by the clerk of this Court to the family of the deceased.

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ABATEMENT.

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“ *Pleading*, 6, 7..

ACCEPTANCE. See *Bill of Exchange*, 1, 2.

ADMINISTRATORS AND EXECUTORS.

1. An administrator who received Confederate money in 1862, and does not, by his returns, or on the trial of a suit commenced against him in 1871, give any explanation of what became of the money, or what he did with it, cannot complain at being held liable for the full amount so received, especially when the verdict is for four years less interest than what was due. *King vs. Newton et al.*..... 150
2. Under section 2406 of the Revised Code, if one chargeable as executor *de son tort* die, his administrator, as such, is chargeable in the same manner and to the same extent as was his intestate, but the administrator does not himself become an executor *de son tort* by taking possession of property found in possession of his intestate, at his death, even though that property was in the possession of the intestate as the executor *de son tort* of another deceased person. *Alfriend & Coleman vs. Daniel, ex'r*..... 154
3. When plaintiffs sue in their representative capacity, on a note due to their testator or intestate, and there is no plea in abatement filed at the first term of the Court, the plaintiffs are not required at the trial term to prove that they have been legally appointed executors or administrators. *Aliter*, if their letters testamentary or of administration constituted a part of their title to the property sued for. *Hazlehurst vs. Morrison*..... 397
4. A judgment against an executor or administrator, where there is no plea, that the sum recovered “be levied of the goods and chattels, lands and tenements

of the testator or intestate," is sufficient, under section 3515, Revised Code, without adding the words "in the hands of, etc., to be administered." These last words are not required by said section. *Wolfolk, adm'r and ex'r, vs. Kyle*..... 419

5. When the maker and indorser of a promissory note are dead, and the administrator of the maker is also executor of the indorser, and suit is brought on the note against him in both capacities, though the judgment does not specify the relation of maker and indorser, it is good against him, at least, so far as he is the representative of the maker, and if levy be made accordingly, he cannot arrest it on that ground by affidavit of illegality. *Ibid.*

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ARBITRAMENT AND AWARD.

1. An award of arbitrators was, by order of the Court, entered on the minutes, during the November term, 1871. At the same term, exceptions to the award were filed. No further action was taken at that term. At the ensuing April term, a demurrer to the exceptions was heard and sustained, and an order to that effect entered on the minutes. At the time of hearing the demurrer, leave was granted to defendant and time given to amend the exceptions. On the next day, the amendment was made and sworn to in open Court, though it does not appear to have been then filed. On the 28th of June, the juries were discharged for the term, and the Court adjourned to the 26th of the ensuing August, to hear motions, etc. On that day, the plaintiff moved for judgment on said award and for execution. Defendant objected, and the Court allowed the amended exceptions to be filed, and

certifies to this Court that he "regarded the application for leave to amend as being in all the time, and why the order dismissing the exceptions was entered on the minutes, he did not remember :"

Held, That as it does not appear that plaintiff made any further motion, or asked for a trial in the case before the discharge of the juries, and had notice of the intention of defendant to file the amended exceptions, and leave granted therefor, and the Judge, who knew all the facts, holding that the time he had granted had not expired, it was not error in the Court to allow them to be then filed. *Tumlin vs. The Virginia H. Insurance Company*..... 26

2. Where exceptions to an award did not contain all the evidence submitted to the consideration of the arbitrators, a demurrer thereto was properly sustained. *The Barnesville Manufacturing Company vs. Caldwell*..... 421

3. When exceptions were filed to an award, which were, on demurrer, held by the Court below to be insufficient, and it appeared by the record that the exceptions were on the ground of a mistake alleged to have been made by the arbitrators in charging the excepting parties with certain items, especially one of \$3,500 00, which, it was alleged, was clearly not a proper charge against them, as would appear by the evidence, which evidence was partly set forth in the exceptions and partly referred to as contained in the books of the parties who are merchants, which books, the exceptions stated, were in the presence of the Court, but being voluminous, were not attached by abstract :

Held, That the contents of the books were a necessary part of the exceptions, and the plaintiffs in error having failed to complete their record in the Court below by having such abstract in fact attached and sent here as part of the record, under the certificate of the clerk, this Court will not reverse the judgment of the Court below, it being impossible for us to say, in the absence of said abstract, whether he was right in his judgment or not. *Richmond & Co. vs. Phillips & Flanders et al.* 542

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1. An affidavit made by the plaintiff in attachment that the debtor "is indebted to deponent to the best of deponent's belief, in the sum of \$1,000 00, and that said resides without the limits of the State," is not "a substantial compliance in all matters of form," required by the attachment laws of this State, and is fatally defective. *Black vs. Scanlon*..... 12
2. A motion to dismiss an attachment founded on such an affidavit may be made whenever the case is called for trial. *Ibid.*
3. Where land was sold under a judgment obtained against the defendant in the United States District Court, of older date than the levy of an attachment returnable to a Superior Court of this State, but the levy of the execution, based upon said judgment, was made after the levy of said attachment, and the plaintiff in attachment was present at the marshal's sale when the claimant purchased, and made no objections, the purchaser obtained a valid title. *Studdard vs. Lemmond* 100
4. Two attachments were placed in the hands of a sheriff and levies made, and whilst the property was in the possession of the sheriff the defendant gave replevy bonds, the security justifying, and stated in the answer of the sheriff to have been at the time a citizen of the State of Georgia, and no exception was taken to the bonds at the return term of the attachments; at the trial term, judgments were rendered against the principal and security, and executions placed in the hands of the sheriff, who made returns of *nulla bona*; the plaintiff petitioned the Court for a rule against the sheriff, who set up the above stated facts in his answer, and also that he had acted in good faith; the answer was not traversed. The Court did not commit error in refusing to make the rule absolute. *Nagle, adm'r, vs. Lumpkin, sheriff*..... 521
5. A non-resident of this State, who is the lessee of a railroad in this State, and therefore liable to be sued as was the railroad company, is none the less liable to be

proceeded against by attachment as other non-residents are. *Breed, lessee, vs. Mitchell*..... 533

ATTORNEY.

1. An attorney at law who was assigned by the Judge of the Superior Court as counsel to defend an indigent defendant, on his trial upon an indictment in the said Court, and who accordingly did appear and defend him, is not entitled by any law of this State to be paid for such services out of the county funds. *Elam vs. Johnson, Ordinary*..... 348
2. Where an attorney at law, in response to a summons of garnishment issued at the instance of a judgment creditor, answers that he has a certain sum of money in his hands belonging to the defendant, which, before he was served with such summons, he had decided to appropriate towards the satisfaction of other judgments than that upon which the process of garnishment issued, but had not actually done so, because he was awaiting the consent or refusal of the defendant to such action, it was not error in the Court to order the fund paid to the oldest execution, after allowing reasonable attorney's fees and costs to the diligent creditors bringing the fund into Court. *Carr vs. Benedict, Hall & Co. et al.*..... 431

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Where such deposit was \$950 00 in gold, and, after demand and refusal, an action of assumpsit was brought for that amount in gold, "or its value in currency," the plaintiff was entitled to recover the value of the gold at the time of the demand, with interest; and as no evidence was introduced on the trial showing it was worth any premium at that time, the recovery could only have been for \$950 00, with interest from the time of the demand. The City Court of Augusta, whose jurisdiction is limited to \$1,000 00, therefore, had jurisdiction of the case.—*Hewitt vs. Brummel*..... 481

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1. Where A is indebted to B, and transfers to him, as collateral security, a receipt given to A for a note for collection, it being for a larger amount than A's debt to B; and the bailee who has the note for collection, with knowledge of the transfer and consenting thereto, permits it to go into the possession of A, who collects it and pays B a portion of his debt, the measure of damages in an action of trover by B against the bailee, is the unpaid portion of B's debt from A. As B would not be liable over to A for any balance, his claim for damages is limited to the amount of his special property in the note. *Sheldon vs. The Southern Ex. Co* 625
 2. On the trial it was competent for the bailee to prove that when he was notified by A and B, who were together, of the transfer, he was not informed that it was made as collateral security, but, on the contrary, it was stated by A that the transfer was made only that the money might be paid to B in the event that A was absent, as he expected to be absent, provided B was present when such a statement was made. *Ibid.*
 3. Under the facts as they appear in the record, it would have been proper to have submitted the question to the jury whether B was present at the time A made the statement to the bailee's agent. *Ibid.*
- See *Warehouseman*, 1-7.

BILL OF EXCEPTIONS.

See *Practice in the Supreme Court*, 1-11, 13.

BILL OF EXCHANGE.

1. If a draft be drawn on an individual, and the drawee, before its acceptance, form a partnership with others, and the partners agree to use in the business of the partnership the goods, for the payment of which the draft was drawn, and to pay for them, and they do so use them, and the partner who is the drawee accept the draft for the partnership, the acceptance is binding on the partners. *Markham et al. vs Hazen & Sons*... 570

2. Where the name of the partnership is the "Republican Association," and whose sole business was the publication of a newspaper, called "The Opinion," and the acceptance is "accepted May 24th, 1867, for the Opinion newspaper," (signed) "W. L. S.," and W. L. S. is one of the partners, it is a sufficient identification of the partnership to bind the partners. *Ibid.*

BOND FOR TITLES.

1. This Court having held in the case of *Bailey vs. Park*—22 Georgia Reports, 116—that a sale of land by the sheriff under an execution for the purchase money, in favor of the vendor against the vendee, where the vendee has only a bond for titles, and the vendor has not filed and had recorded in the Clerk's office a deed to his vendee for the land, before the levy is made, is illegal and void, and also reaffirmed the same principle in *Harville vs. Lowe and Smith*, 47 Georgia Reports, 214, and this case coming within that principle, and the purchaser at the sheriff's sale being charged with notice, the Court erred in dismissing complainant's bill for want of equity: Code, section 3604. *Brunson vs. Grant et al.*..... 394
2. If the purchaser at such sale be a third party, and has paid the price bid by him, and the same has been applied towards the extinguishment of the vendee's debt, he is entitled to be reimbursed out of the land to the extent of such payment of such debt. *Ibid.*

BUILDING AND LOAN ASSOCIATION.

1. The stockholders of a chartered loan and building association agreed unanimously, at a period long antecedent to the time when, by the rules of the company, it would close, to cease operations and settle their mutual relations on principles of equity. At the same meeting a majority of the stockholders adopted by vote a scheme of settlement, which repudiated, as a basis, the rule of crediting each stockholder with his payments and legal interest thereon, and charging him with his receipts and legal interest, but was based upon an arbitrary compromise of the assumed rights of the borrowers and non-borrowers under the charter, in its ordinary working. A large minority of the stockholders protested against this scheme and filed a bill

in equity, seeking to enjoin the officers of the corporation from carrying out said scheme, and praying that the rights of the parties should be ascertained and the assets disposed of by the Court on principles of equity which the bill claimed simply required each stockholder to be credited with his payments and legal interest and charged with his receipts and legal interest: *Held*, Even though the rules of the company under the charter were not obnoxious to the laws against usury, still, as by common consent it was agreed that the company was now to wind up, and as the contracts of the parties must therefore of necessity be set aside, and the rules of the charter be disregarded, it was not competent for the majority to adopt a scheme repudiating the rate of interest prescribed by law between persons having moneyed dealings with each other, and that the injunction was therefore properly granted. *City Loan and Building Association of Augusta vs. Goodrich et al.*..... 445

2. The cardinal rule for the settlement among the stockholders on principles of equity will be to charge each stockholder with his receipts and interest on them from the time of the receipt, and to credit such stockholder with his payments and interest from the date of the same, according to the rules of law for such calculations, to divide the assets according to the result, subject, of course, to such equitable modification and adjustment as to expenses, losses, etc., as may appear equitable from the proof at the trial. *Ibid.*
3. The injunction prohibiting the officers from carrying out the plan adopted by the majority ought not to hinder the collection of the debts due by the forfeiting stockholders. *Ibid.*
4. Under the prayer of the bill it is the duty of the Chancellor to take such order as will insure the speedy payment of the balances due and the collection of the assets, including any insurance policies, that the company may own or may hold as collaterals, according to the rights of the parties in each case, as well as balances due by stockholders, as debts due by persons who had forfeited their stock before the date of the assessment, as will insure the speedy preparation of the whole matter for a final decree. *Ibid.*

CARRIERS.

1. Delivery of produce to a common carrier, consigned to factors under a contract before that time made, is such a delivery to the latter as will cause their lien to attach for advances made. *Elliott vs. Cox et al*..... 39
2. An action against a common carrier for negligence in the performance of his duty as a carrier, under a contract to carry, is an action upon the case *ex delicto*, and may be joined with a count in trover or trespass *vi et armis*, but if the action be for negligence alone, under the contract to carry, or if the counts in trover or trespass *vi et armis*, be abandoned, the plaintiff cannot repudiate the contract, either expressed or implied, under which the carrier received the goods, and recover for an unlawful taking. *Southern Ex. Co. vs. Palmer & Co*..... 85
3. A carrier who receives goods to carry from one not authorized to deliver them to him, is a trespasser, and may be sued in trover for the goods, as any other illegal taker may be; but if a suit be brought against him as a carrier, charging him with having taken the goods under a contract with the plaintiff's agent, and with neglect of duty under the obligations of that contract, and there be no count for a wrongful taking or conversion, the plaintiff can only recover for a breach of duty, under the contract, as made with his agent. *Ibid.*
4. The contract in the record between the Adams Express Company and the Southern Express Company is an express contract, signed by both parties, in which it is specifically agreed that the Southern Express Company should not be liable for "river risks" on any goods delivered to it for carriage by the Adams Express Company, and if the owner of the goods sue the Southern Express Company, not as a tortious taker, but as a carrier under that contract, for negligence, by which the goods were lost, he must abide by its terms. *Aliter*, if he sue in trover or in trespass for an illegal taking or conversion. *Ibid.*
5. The case of the *Southern Express Company vs. Shea*, 38 *Georgia Reports*, 519, and the case of the *Southern Express Company vs. Cohen & Menko*, 45 *Georgia Reports*, 148, are, as to the facts and the pleadings, similar to the present case, and must control it. *Ibid.*

6. If an action upon the case, against a common carrier for negligence, under his contract, be brought within four years, and, after four years have elapsed, the plaintiff amend his writ by adding a count in trover, and a count for trespass *vi et armis*: *Query*—whether the new counts are barred? *Ibid.*
7. The liability of a common carrier ceases if the goods are taken from his possession by *legal* process. *Savannah, Griffin & N. A. R. R. Co. vs. Wilcox, Gibbs & Co.*..... 432
8. It is not *the duty* of a common carrier to keep his doors locked and to refuse entrance to a sheriff, who comes to seize property in the possession of the carrier, if the sheriff have legal process. *Ibid.*
9. When goods delivered to a common carrier for transportation were seized by legal process and taken out of his possession by the sheriff, and the carrier forthwith gave notice to the consignor and consignee, and they made no reply and took no further notice of the proceedings:
Held, That the carrier had a right to presume they had abandoned the property, as subject to the legal process which had seized it. *Ibid.*
10. Where goods arrive at their point of destination and the packages or casks are, by the fault of the carrier, in a damaged condition, so that they cannot be handled without loss and further damage, it is the duty of the carrier to repair the casks, if possible, before the owner can be compelled to receive them, and if he refuse to do this, the owner may refuse to receive the goods and may recover the value, and this without offering to pay the freights, since the carrier has not completed his undertaking. *Breed, lessee, vs. Mitchell.*..... 533
11. Goods are *prima facie* presumed to have been received by a carrier in good order for shipment, and if they were not so, it is for the carrier to show it. *Ibid.*
12. Under the Act of Congress, passed March 3d, 1851, entitled, "An Act to limit the liability of ship owners and for other purposes," the owners of a steamer, which was a "first-class freight boat," and "a seagoing vessel," engaged in the carrying trade between Baltimore, Norfolk and Portsmouth, are not liable for the loss of goods by the destruction of the vessel and cargo by

fire, unless caused by the design or neglect of the owners. Nor does the fact that such owners have formed an association with other companies as carriers, extending their business as carriers into the interior, affect the question of liability for such loss. *Headrick & Bro. vs. Virginia and Tennessee A. L. R. R. Co.*..... 545

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CERTIORARI.

1. The affidavit *in forma pauperis*, allowed by section 3984 of the Code to be made by a party applying for a writ of *certiorari*, cannot be made for him by his attorney at law. *Selma R. & D. R. R. Co. vs. Tyson.* 351
2. Where a writ of *certiorari* has been granted, and the Court dismisses the same on the ground of non-compliance by the petitioner with some requisition of the statute, and plaintiff in *certiorari* makes application within three months from said dismissal for another writ, he is not barred by lapse of time, from having his second application heard: 32 Ga. R., 487. *Grimes vs. Jones.*..... 362
3. The facts set forth in the application for the writ of *certiorari* in this case entitles the plaintiff to the granting of the writ. *Ibid.*

CHARGE OF COURT.

1. It is not error for the Court, in a charge to the jury, to state hypothetical illustrations of a legal principle, unless it be done in such manner as would imply that they were intended to be used as facts which had been proven by the evidence. *Sharpe vs. The State.*..... 16

2. It is error for the Court to charge upon a point not in evidence. *Mobley vs. Breed, lessee*..... 44

3. Defendant's counsel requested the Court to charge the jury, "that if they entertained doubts as to the law, the prisoner is just as much entitled to the benefit of those doubts as if they applied to the facts; that if they entertain a reasonable doubt as to whether the evidence is applicable to the law as given them in charge, then the prisoner is entitled to the benefit of that doubt, and it would be their duty to acquit." And the Court does not charge the written request, but does charge that the jury are "exclusive judges of the testimony. You take the law from the Court, the testimony from the witnesses, see what it is, and apply one to the other. You judge of them, and they enable you to arrive at the truth," and also further charged, "the mind of a juror must be convinced so that no reasonable doubt remains of defendant's guilt; that is to say, after you have impartially, carefully and solemnly examined and weighed all the testimony in the case, if your mind is still unsettled, wavering, not at rest, it would be your duty to acquit the defendant, for that is the doubt of the law:"

Held, That the defendant was not entitled to the first clause of the written request, and though the second clause may correctly state the law on the point contained in it, still a new trial will not be granted, because it was not given in charge just as it was written, when the charge that was given gave the defendant all the benefit he could have claimed under the principle involved in that portion of the written request, which was legal. *Oneil vs. The State*..... 66

4. Where the Court charged the jury, "that if there is a theory on which the case can be placed, and all of the witnesses speak the truth, that is the true theory, and it is your duty to adopt it. If there is a basis on which you can put the case, and all the witnesses speak the truth, it is your duty to adopt that as true," and immediately adds, "but if this cannot be done, and the testimony cannot be so reconciled, then look to the witnesses. See what is true and what false. You are exclusive judges of this, and in passing upon it you judge it not in detached portions, but determine the truth or falsehood of each fact by the light of all the

testimony in the case. Take each witness as he appears, and is presented to you by this record—by this testimony—as he appeared to you on the stand, and as his statements appeared before you, and from other witnesses in the case, determine who is to be believed, what portion is to be believed and what rejected:

Held, That this charge was not error; and it placed no illegal limitation on the right of the jury to disbelieve any testimony or any witness, which, under the law and the evidence, they had the privilege to reject as unworthy of credit. *Ibid*.

5. Where the charge was given on Saturday evening, it was not error for the Court to say to the jury, "if you should make up your verdict at any time before twelve o'clock to-night, let the sheriff notify me, and I will come to the Court-house to receive it." And the more especially was that not error when the Court added, "but let not the hour control or influence your decision or deliberations. Let not that consideration shorten or lighten your deliberations one single instant. Examine the case carefully. *Ibid*."
6. If a written request be made to charge, legal in its terms and pertinent to the matter on trial, it is the duty of the Court to charge at least the substance of it; it is not enough, if by inference it may be covered by some other charge, unless that inference be very plain and noticeable. *Wood vs. The State*..... 192
7. When the general charge of the Court as to the negligence was correct, an omission to charge as to any particular fact in the testimony connected with that question; was not error. If a more specific charge had been desired, it should have been requested. *Headrick & Bro. vs. Virginia and Tennessee Air Line Railway Company*..... 545
8. Where the issue upon trial was whether a judgment of a Court declaring a draw in a land lottery by a minor orphan fraudulent, had been obtained by fraud, it was error in the Court to charge, "that the fact that Kirkpatrick, the informer, designated or suggested that Taff was a suitable person to be, and should be, appointed guardian *ad litem*, and that Taff failed to appear and defend the case, were both strong circumstances of fraud; that it was not to be presumed that Kirkpatrick, the informer, who was seeking to con-

demn the draw as a fraudulent draw, would designate a person as guardian *ad litem*, who would honestly and fairly defend the case and protect the rights of the orphan." *Johnson et al. vs. Wright et. al.*..... 648

CLAIM.

1. When a mortgage *fi. fa.* for the sale of a parcel of land was, under the orders of the plaintiff's attorney, levied on the land, and the same was sold at sheriff's sale, and the money raised applied to the *fi. fa.*, and subsequently, on a statement that the *fi. fa.* was lost, the plaintiff procured an *alias fi. fa.* to issue (taking no notice of the sale) and caused it to be again levied on the land, and a claim was interposed by one claiming under the defendant in the mortgage:

Held, That the claimant may attack the plaintiff's *fi. fa.* by showing that the orders had been complied with, and the land sold according to its commands, and that it was not competent for the plaintiff in reply to show that said sale was illegal, it having been made whilst there was a pending injunction prohibiting said *fi. fa.* from proceeding. The Court will not permit the plaintiff to set up his own wrong; said sale and the return thereof are existing facts, and until set aside by a proceeding for that purpose, cannot be treated as null by the very party who thus disobeyed the order of the Chancellor. *Horton & Rikeman vs. Kohn*..... 183

2. Under section 3027 of Irwin's Revised Code, authorizing parties having equitable causes of action to institute proceedings for their recovery on the law side of the Superior Court, it is not competent for a plaintiff in execution on the trial of an issue, made upon an affidavit of a "claimant," of a tract of land levied on by the *fi. fa.*, to enlarge and change the issue by alleging that, though the land is not subject to the execution, yet it was bought by the claimant from the defendant, with full notice that the purchase money for the same was still due to the plaintiff, and that the land is therefore subject to the vendor's lien for the purchase money, which is the debt on which the judgment levied is founded. The amendment is not sufficiently germane to the issue formed under our claim laws to justify it. *Cox vs. Wadsworth*... .. 619

CONFEDERATE STATES.

1. When, during the late war, a company of men organized as soldiers, though unarmed, were on their way from Columbus to Atlanta, with the open intent to offer themselves to Governor Brown for service as soldiers in the Confederate army, and a railroad company received them on its cars as soldiers, with their baggage, the transportation to be paid for by the State or Confederate authorities :

Held, That both the company of men and the railroad company were engaged in an illegal transaction, and the rule *in pari delicto*, etc., applies to a suit against the railroad company for negligence in its duty as a common carrier. *Redd, ex'r, vs. Muscogee R. R. Co.* 102

2. But when it appeared by the proof that one of the soldiers having with him a negro slave, and the railroad company refused to carry the slave as a soldier, or as a part of or adjunct to the company, but demanded and received from the soldier fare for said slave as an ordinary passenger, the rule *in pari delicto* does not apply, and if the owner of the slave is injured by the negligence of the road, he can recover for the injury. *Ibid.*

3. An administrator who received Confederate money in 1862, and does not, by his returns, or on the trial of a suit commenced against him in 1871, give any explanation of what became of the money, or what he did with it, cannot complain at being held liable for the amount so received, especially when the verdict is for four years less interest than what was due. *Ibid.*

4. Where a trustee received a large sum of money in April, 1860, and in February, 1864, obtained an order from the Judge of the Superior Court, authorizing him, as trustee, to invest the fund then in his hands in Confederate money, in Confederate bonds, which was done, and the same became worthless, it was error to charge that the order of the Judge of the Superior Court was conclusive proof that it was trust money which was so ordered to be invested. *Westbrook, trustee, vs. Davis et al., adm'rs*..... 471

5. When a trustee has received Confederate money during the war in the discharge of his legal duty, when it was the common currency of the country, in good faith,

when prudent business men were receiving it, he will be protected, but the facts and circumstances under which it was received, must be clearly and satisfactorily shown as evidence of that good faith and the fairness of the transaction. *Ibid.*

CONSOLIDATION OF CASES.

See *Equity*, 12.

CONSTITUTIONAL LAW.

1. Section 918, Revised Code, authorizing the Governor to vacate the commission of defaulting tax collectors, is not "inconsistent with" Article IX. of the Constitution, which provides that county officers "shall be removable, on conviction, for malpractice in office, or on the address of two-thirds of the Senate," so as to be annulled by said Article, or by section 3, Article XI., of the Constitution. *The State ex rel. vs. Frazier*..... 137
2. Article II., section 4, of the Constitution, provides that "no holder of any public moneys shall be eligible," etc., and section 120, Revised Code, makes the failure or refusal by all holders or receivers of public money of the State to account for or pay over the same, after reasonable opportunity, "a sufficient reason for vacating any office held by such person." Section 918 of the Code provides that the Governor may so vacate a commission in case of a defaulting tax collector. *Ib.*
3. Pending the proceedings by *scire facias* against the securities on a bond given for the appearance of a prisoner who was charged with the offense of murder, an Act of the General Assembly was passed relieving the securities from liability on the payment of the costs. The Solicitor General had no vested right in the bond to the amount of five per cent. of which the General Assembly could not deprive him. *Jordan, Solicitor General, vs. Baynes et al.*..... 462
4. When a suit was pending, on an express contract, and the defendant, after filing a plea of the general issue, under oath, withdrew his plea and filed the same plea not under oath:
Held, That under the Constitution of 1868, it was the duty of the Court to render a judgment for the plaintiff, on proof of the allegations in the declaration, and

it was error in the Court to permit the defendant to introduce evidence in support of his plea. *Craig vs. Pope*..... 551

See *Eminent Domain*, 1-3.

CONTINUANCE.

1. Excitement in the public mind, and excited public feeling in the county in which a crime has been committed, is not alone sufficient to authorize the continuance of a case. *Johnson vs. The State*..... 116
2. Where the defendant was indicted for having used obscene and vulgar language in the presence of a female, without provocation, the absence of a witness by whom he expected to prove that the female was at one time pregnant, and absented herself from the community in which she lived on that account, was no ground of continuance, as such proof, if introduced, would constitute no defense. *Brady vs. The State*..... 311
3. Where a Justice of the Peace is charged with false imprisonment under color of legal process, the warrant under which the arrest was made being set out in the indictment, he is not entitled to a continuance on account of the absence of a witness by whom he expects to prove a parol commitment of the person arrested for contempt of Court. *Campbell vs. The State*..... 353

CONTRACTS. See *Principal and Agent*.

CORPORATIONS.

1. A member of a chartered company may, by his acquiescence or presumed assent, become bound by the acts of his company, and thereby be disabled from setting them up as a defense, when he could have so set them up were it not for such presumed ratification. *May vs. Memphis B. R. R. Co*..... 109
2. The original contract between the stockholders of a railroad company, as contained in the charter, cannot be materially or essentially altered by an amended charter, so as to bind the subscribers thereto without their consent. *Ibid.*
3. A foreign corporation transacting business in this State, may be garnished for a debt it may owe any-

where in this State where suit for such debt could be brought. *Selma R. & D. R. R. Co. vs. Tyson*..... .. 351

4. The stockholders of a chartered loan and building association agreed unanimously, at a period long antecedent to the time when, by the rules of the company, it would close, to cease operations and settle their mutual relations on principles of equity. At the same meeting a majority of the stockholders adopted by vote a scheme of settlement, which repudiated, as a basis, the rule of crediting each stockholder with his payments and legal interest thereon, and charging him with his receipts and legal interest, but was based upon an arbitrary compromise of the assumed rights of the borrowers and non-borrowers, under the charter, in its ordinary working. A large minority of the stockholders protested against this scheme and filed a bill in equity, seeking to enjoin the officers of the corporation from carrying out said scheme, and praying that the rights of the parties should be ascertained and the assets disposed of by the Court on principles of equity which the bill claimed simply required each stockholder to be credited with his payment and legal interest and charged with his receipts and legal interest:

Held, Even though the rules of the company under the charter were not obnoxious to the laws against usury, still, as by common consent it was agreed that the company was now to wind up, and as the contracts of the parties must therefore of necessity be set aside, and the rules of the charter be disregarded, it was not competent for the majority to adopt a scheme repudiating the rate of interest prescribed by law between persons having moneyed dealings with each other, and that the injunction was therefore properly granted. *City Loan and Building Association of Augusta vs. Goodrich et al.* 445

5. The cardinal rule for the settlement among the stockholders on principles of equity will be to charge each stockholder with his receipts and interest on them from the time of the receipt, and to credit such stockholder with his payments and interest from the date of the same, according to the rules of law for such calculations, to divide the assets according to the result, subject, of course, to such equitable modification and adjustment as to expenses, losses, etc., as may appear equitable from the proof at the trial. *Ibid.*

6. The injunction prohibiting the officers from carrying out the plan adopted by the majority ought not to hinder the collection of the debts due by forfeiting stockholders. *Ibid.*
7. Under the prayer of the bill it is the duty of the Chancellor to take such order as will ensure the speedy payment of the balances due and the collection of the assets including any insurance policies, that the company may own or may hold as collaterals, according to the rights of the parties in each case, as well as balances due by stockholders, as debts due by persons who had forfeited their stock before the date of the assessment, as will insure the speedy preparation of the whole matter for a final decree. *Ibid.*

COSTS. 'See *Constitutional Law*, 3.

COUNTY MATTERS.

1. An attorney at law who was assigned by the Judge of the Superior Court as counsel to defend an indigent defendant, on his trial upon an indictment in the said Court, and who accordingly did appear and defend him, is not entitled by any law of this State to be paid for such services out of the county funds. *Elam vs. Johnson, Ordinary*..... 348
2. Under the Act of December 5th, 1805, granting to the Inferior Courts of the several counties of this State, jurisdiction to authorize the establishment of bridges and ferries, etc., it was not within the powers of the Inferior Court of Floyd county to grant to any person the exclusive right to build and establish bridges upon the Coosa and Etowah rivers for three miles from the junction of said rivers in said county, nor had the said Court or its successor, the Ordinary, under any law passed since 1805, any such authority, and the order of the Inferior Court granting the exclusive privilege contended for, is without authority and void. *Wright et al. vs. Nagle et al.*..... 367
3. When, without authority of law, a railroad company, thirty years ago, changed the public road at one of its crossings, cut out a new road, and, at some expense, built a bridge over a stream said new road crossed; and, by common consent, the old road was abandoned and the new one used by the public:

Held, That the railroad company, in the absence of any contract so to do, is not bound to keep up said bridge, and the mere fact that the company first built it, and that it has since, at various times, repaired it, (it being near one of its depots,) does not make an implied contract with the county that the company will keep it in repair. *Brookins, Ordinary, vs. Central Railroad and Banking Company*..... 523

CRIMINAL LAW.

1. It is not error for the Court, in a charge to the jury, to state hypothetical illustrations of a legal principle, unless it be done in such manner as would imply that they were intended to be used as facts which had been proved by the evidence. *Sharpe vs. The State*..... 16
2. In this case the jury were clearly authorized to believe that the defendant entered the house through a window, into a room where a girl of thirteen or fourteen years of age was sleeping, and got into her bed and under the cover, whilst she was asleep, and aroused her by touching her person, and that his purpose was to have sexual intercourse with her, and they having found, under a legal charge by the Court, that from his reckless and daring conduct, his intent was to use violence in the accomplishment of his purpose, this Court will not say the Court below erred in refusing a new trial on the ground that the verdict was contrary to the law or the evidence. *Ibid.*
3. The verdict was not contrary to evidence, the case being, under the evidence, one where manslaughter was a very proper verdict. *Farrow vs. The State*.. 30
4. Whatever may be the law, in a proper case, as to how far a man must retreat to avoid an assault not a felony, there was nothing to show that defendant had retreated at all, and for this reason, neither the refusal to charge, as asked, nor the charge as given, was such error, if error at all, as to justify a new trial. He was not entitled to the charge as asked for, and the charge as given did him no harm, but rather good service; it presented a hypothesis in his favor, based on his retreat, of which there was no evidence. *Ibid.*
5. The introduction of the prisoner's statement is not such an introducing of testimony as deprives the pris-

oner of the conclusion, if he introduces no testimony, but we are of the opinion that the statement of the Judge, to the effect that, if it was introduced, he would, when the time for the argument came, hold the prisoner not entitled to the conclusion, was not, under the statute, a decision so as to authorize a bill of exceptions. *Ibid.*

6. The allegation that the person killed was Robert Germany, a person of color, was sustained by proof that Robert Germany was the name of the deceased, the words person of color being unnecessary and surplusage. *Ibid.*

7. The newly discovered evidence was not shown to be in fact in existence, by the affidavit of the witness by whom it could be proved, or any excuse given for its non-production. *Ibid.*

8. If the evidence contained in the record does not show where the offense was committed, of which a defendant is found guilty, and there be an assignment of error that the verdict was contrary to law, a new trial will be granted. *Carter vs. The State; Meriwether vs. The State*.....

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9. Where a defendant, on trial for murder, objects to evidence showing that he killed James Little, on the ground that the indictment charges him with the murder of James Lutle, and the presiding Judge, on inspection, held the name to be James Little, and all the testimony proved that to be the name of the party slain, this Court will not, by an examination of the original indictment, overrule the judgment of the Court below. The testimony in case of conviction is made a part of the record in the case, and had the defendant been acquitted, and afterwards been again put on trial for the murder of James Little, the introduction of the whole record would have sustained the plea of *autrefois acquit*. *Oneil vs. The State*.....

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10. Under the same rule, this Court will not overrule the judgment of the Court below refusing to arrest the judgment on a motion founded on the same ground, to-wit: "That the name of the deceased in the indictment was Lutle, and the evidence was, 'that the person killed was named Little. *Ibid.*

11. Defendant's counsel requested the Court to charge the jury, "that if they entertained doubts as to the law,

the prisoner is just as much entitled to the benefit of those doubts as if they applied to the facts ; that if they entertain a reasonable doubt as to whether the evidence is applicable to the law as given them in charge, then the prisoner is entitled to the benefit of that doubt, and it would be their duty to acquit." And the Court does not charge the written request, but does charge that the jury are "exclusive judges of the testimony. You take the law from the Court, the testimony from the witnesses, see what it is, and apply one to the other. You judge of them, and they enable you to arrive at the truth," and also further charged, "the mind of a juror must be convinced so that no reasonable doubt remains of defendant's guilt ; that is to say, after you have impartially, carefully and solemnly examined and weighed all the testimony in the case, if your mind is still unsettled, wavering, not at rest, it would be your duty to acquit the defendant, for that is the doubt of the law :"

Held, That the defendant was not entitled to the first clause of the written request, and though the second clause may correctly state the law on the point contained in it, still a new trial will not be granted, because it was not given in charge just as it was written, when the charge that was given gave the defendant all the benefit he could have claimed under the principle involved in that portion of the written request, which was legal. *Ibid*.

12. Where the Court charged the jury "that if there is a theory on which the case can be placed, and all of the witnesses speak the truth, that is the true theory, and it is your duty to adopt it. If there is a basis on which you can put the case, and all the witnesses speak the truth, it is your duty to adopt that as true," and immediately adds, "but if this cannot be done, and the testimony cannot be so reconciled, then look to the witnesses. See what is true and what false. You are exclusive judges of this, and in passing upon it you judge it not in detached portions, but determine the truth or falsehood of each fact by the light of all the testimony in the case. Take each witness as he appears, and is presented to you by this record—by this testimony—as he appears to you on the stand, and as his statements appear before you, and from other wit-

nesses in the case, determine who is to be believed, what portion is to be believed and what rejected:”

Held, That this charge was not error; and it placed no illegal limitation on the right of the jury to disbelieve any testimony or any witness, which, under the law and the evidence, they had the privilege to reject as unworthy of credit. *Ibid.*

13. Where the charge was given on Saturday evening, it was not error for the Court to say to the jury, “if you should make up your verdict at any time before twelve o’clock to-night, let the sheriff notify me, and I will come to the Court-house to receive it.” And the more especially was that not error when the Court added, “but let not the hour control or influence your decision or deliberations. Let not that consideration shorten or lighten your deliberations one single instant. Examine the case carefully.” *Ibid.*

14. In view of the whole case, we cannot say that the verdict is not sustained by the evidence, and the law as to manslaughter having been fully and fairly given in charge, this Court will not interfere with the judgment of the Court below refusing a new trial. *Ibid.*

15. Excitement in the public mind, and excited public feeling in the county in which a crime has been committed, is not alone sufficient to authorize the continuance of a case. *Johnson vs. The State*..... 116

16. Where a defendant is on trial for an offense for which he will be punished by death, unless the jury shall otherwise recommend, it was not error in the Court to allow a juror to be set aside by the State for cause, upon the statement that he was conscientiously opposed to capital punishment. *Ibid.*

17. Where a defendant is on trial for the offense of arson, the finding of goods stolen from the burnt house in his possession, though not proof of the crime charged, yet it is a circumstance, connected with other evidence, which the jury may consider in making up their verdict. *Ibid.*

18. Where a man, or a man and his family, or a woman, or a woman and her family, are living in a dwelling house, and have their household effects, or valuable articles in such a dwelling house, and are temporarily absent at church, or on a visit to a neighbor, or on business, and the dwelling house is burnt during such

temporary absence, it is the burning of an occupied dwelling house, within the meaning of the statute, although no one was in the dwelling house at the time it was burnt. *Ibid.*

19. The verdict, under the law, if they did not intend that the punishment of death should be commuted, should have been a verdict of guilty generally. If the jury did intend, by their verdict, that the penalty of death should be commuted to imprisonment for life in the penitentiary, then, under the law, they should have so recommended. The recommendation of the prisoner to the mercy of the Court did not authorize the Court, under the law, to commute the penalty of death. The verdict, therefore, under the law applicable to this class of cases, in which the penalty of death may be commuted, was an illegal verdict, and should be set aside. *Ibid.*

20. Where the Court charged the jury, "that every witness in the case is to be believed until impeached in some one of the modes known to the law. A jury cannot, arbitrarily, of their own motion, set aside the evidence of any witness; the presumption of innocence attaches to witnesses which remains until removed by proof," and there was no impeaching evidence, unless the statement of the defendant not under oath shall be considered as such, in reference to which the Court charged the jury, "that they were the exclusive judges of the weight that was due to such statement," the charge was not erroneous. *Jones vs. The State*..... 163

21. Where the issue, on a trial of an indictment for perjury, was whether the defendant swore willfully, absolutely, knowingly and falsely, in swearing that he did not make and deliver a promissory note to the prosecutor, nor authorize any one else to make the note for him, and it was in evidence that the defendant could not read or write, and that the note was written and signed by a third party, though at the request of defendant, and read to him, it was error in the Court to refuse to permit the defendant to prove that "it was the understanding of the parties to the paper which was executed that the same was not intended as a note, but simply as a memorandum of an agreement to submit a controversy to arbitration." *Flemister vs. The State* 170

22. A married man, known by a female of ordinary sense to be such, may be guilty of the crime of seducing said female, but under section 4305 of the Revised Code, which provides that any person who, by persuasion and *promise of marriage*, or other false and fraudulent means, shall seduce, etc., a married man, known by the woman to be such, cannot, if she be a woman of ordinary sense, be guilty of seducing her by "persuasion and promise of marriage." *Wood vs. The State.* 192
23. Whilst we recognize the law to be that a married man, known to be such by the woman seduced, may be guilty of seduction by other false and fraudulent means than by persuasion and promise of marriage, yet a count in an indictment which charges seduction by false and fraudulent means, and sets forth as one of such means a promise of marriage made by a married man to an unmarried female of ordinary sense, who knows he is married, is not a good count, unless it also contain charges of other means, false and fraudulent, sufficient in themselves to constitute the offense, and said count, though then a good count, is only so because of the charge of said other false and fraudulent acts. *Ibid.*
24. A charge of seduction which sets forth that the defendant was a teacher of a school and the girl seduced his pupil, a minister of the gospel and the girl a member of the church of which he was the pastor, that he told her he loved her, that she was congenial with him, that he had prayed over their relations, and that it would not be wrong for her to submit her person to him, by means of which, etc., is a good charge. *Ibid.*
25. The guilt of the accused will depend on the proof and on the actual influence under all the facts, including the several characters of each, and her confidence in him and the effect which such statements had in truth upon the girl. *Ibid.*
26. On the trial of an indictment for seduction, it was error in the Court to charge the jury that whilst the woman seduced must be a virtuous unmarried female, yet the test of her virtue was whether she had or had not before that time ever had illegal sexual intercourse with a man. *Ibid.*
27. When, on a trial for seduction, the female alleged to have been seduced was the sole witness to the prin-

cipal facts, and in her evidence she declared that for two years after the alleged seduction before the trial, she had lived a life disclosing great moral turpitude, hypocrisy, and the Court was asked, in writing, to charge the jury that one ground for disbelieving a female witness was, that if the witness disclosed in her testimony acts done by her and habits of life pursued by her which exhibit moral turpitude in herself, and the Judge refused :

Held, That this was error, and the fact that the prisoner on trial is charged to have been the cause of said acts, and to have joined in them, does not alter the rule. *Ibid*.

28. On a trial for seduction, acts and sayings between the parties, bearing upon the principal fact, both before, at the time of, and after, are admissible in evidence as inducement, as part of the *res gestæ*, and as explanatory and in mitigation or exculpation of the principal fact. *Ibid*.

29. Under an indictment for seduction, it is competent for the jury to find the defendant guilty of adultery or adultery and fornication, if the proof would justify it. Seduction is the higher offense, and necessarily makes the other, and it was error in the Judge, on the written request of the defendant's counsel, to refuse to point out to the jury in his charge the difference between these offenses. *Ibid*.

30. Where the defendant was indicted for having used obscene and vulgar language in the presence of a female, without provocation, the absence of a witness by whom he expected to prove that the female was at one time pregnant, and absented herself from the community in which she lived on that account, was no ground of continuance, as such proof, if introduced, would constitute no defense. *Brady vs. The State*..... 311

31. When obscene and vulgar language is used in the hearing of a female, the words are used in the presence of a female, as contemplated by the statute. *Ibid*.

32. Where a defendant is convicted of a misdemeanor and the judgment is that he do pay a specified fine and costs of prosecution, and he refuses to pay the fine and costs, the Judge has the power to order the clerk of the Court to issue an execution against the property of

- the defendant to enforce the collection of the fine and costs. *McMeekin vs. The State*..... 335
33. If, in addition to the fine, etc., the judgment directs that the defendant shall be held in custody until the fine and costs are paid, so that the imprisonment do not exceed six months, and the defendant is so held in custody and discharged at the termination of six months, without payment of the fine or any of the costs :
Held, That the imprisonment was no part of the penalty, and the power still existed in the Court to order the issue of the execution to collect the fine and all the costs. *Ibid*.
34. Where a Justice of the Peace is charged with false imprisonment under color of legal proces, the warrant under which the arrest was made being set out in the indictment, he is not entitled to a continuance on account of the absence of a witness by whom he expects to prove a parol commitment of the person arrested for contempt of Court. *Campbell vs. The State*..... 353
35. A Justice of the Peace indicted for false imprisonment under color of legal process, is not entitled to the right of appearance and being heard before the grand jury at the time the true bill is found. *Ibid*.
36. The law does not presume malice against a judicial officer because he renders an illegal judgment, or because, in the discharge of his official functions, he does an illegal act. *Ibid*.
37. This Court will not reverse the judgment of the Judge of the Superior Court refusing a new trial, simply because, from the evidence, there may arise in a fair mind a reasonable doubt of the prisoner's guilt. *Jones vs. The State*..... 458
38. To authorize a new trial on this ground, the failure in the testimony to establish guilt must be so complete as to make doubt and uncertainty inevitable. If a fair mind may, under the testimony, be satisfied beyond a reasonable doubt, the verdict is not illegal. *Ibid*.
39. Pending the proceedings by *scire facias* against the securities on a bond given for the appearance of a prisoner who was charged with the offense of murder, an Act of the General Assembly was passed relieving the securities from liability on the payment of the costs.

- The Solicitor General had no vested right in the bond to the amount of five per cent. of which the General Assembly could not deprive him. *Jordan, Solicitor General, vs. Baynes et al.*..... 452
40. An indictment for burglary, charging the offense to have been committed in the night of a certain day, is sufficient, and it is not necessary to allege the hour when the burglary was committed. *Bethune vs. The State* 505
41. Burglary may be committed in a house which is "the place of business of another, where valuable goods, wares or produce, or other articles of value are contained or stored." If it be not the "mansion or dwelling or store-house," it is sufficient if it be proven to be "the place of business of another, where valuable goods, etc., are contained or stored," although that "business" may not be of the kind which is carried on in conducting a "store-house." *Ibid.*
42. It is not necessary, in order to sustain the charge of burglary, to prove the house broken into and entered was the "place of business," etc., used for the purpose of containing or storing the goods alleged to have been stolen. If the goods were, in fact, contained or stored in such a house at the time, it is sufficient to support the indictment, and this is also sufficient, although the business done in the house be not carried on with or in the articles or goods stolen. *Ibid.*
43. F. H. Hall was tried upon an indictment containing two counts, one for assault with intent to murder, and one for shooting at another, not in his (the prisoner's) own defense. On the trial it was proposed to prove by the defense as a part of the *res gestæ*, the prisoner's statement, as to how he received a certain bruise on his arm. The statement was made some ten or twelve minutes after the shooting, after the difficulty was entirely over, after the prisoner had been arrested, and whilst he was in charge of the bailiff on his way to prison:
Held, That it was not error in the Court to reject the statement. *Hall vs. The State*..... 607

CUSTOM. See *Evidence*, 25, 26.

DAMAGES.

1. When there was a trial of a suit for damages for killing the plaintiff's cow against a railroad company, and the declaration claimed as a part of the damages, expenses of litigation, under section 2801 of Irwin's Revised Code:

Held, That it was not error in the Court to permit the plaintiff to prove "that he offered to compromise, that they refused and offered to pay him \$30 00. He refused to take \$50 00, but was willing to settle without suit." *Selma R. & D. R. R. Co. vs. Fleming*..... 514

2. When a suit was brought against a railroad company for damages caused to the plaintiff by his falling into an excavation made by the company across the public highway, and it appeared in proof that the public highway had for years run in a particular place; that on the approach of the railroad constructors to that place, the road had been turned so as to take a different route; that within a week or ten days after the change, the plaintiff, traveling the road with his wagon and team, had taken the old route, it being in the night, and had been stopped by the cut or excavation; that he had got out of his wagon to see what was the matter, and in passing to the front had fallen into the cut and broken his thigh, so as to cause him great pain, expense and loss of time, and so as to lessen his effectiveness as a working man one-fourth, for life, and so as to shorten his leg by three inches:

Held, That the measure of damages in such a case is the actual injury suffered. This may include bodily and mental suffering. And when the Court added to this charge that the jury might include "the injury to his pride, his manhood," that whilst the latter language is not strictly accurate, yet, as the proof shows that the plaintiff was permanently deformed by being lamed for life, the jury may well have understood the Court, as referring by his words to this deformity, and as the verdict is not excessive, this Court will not disturb it. *Atlanta & R. A. L. R. R. Co. vs. Wood*..... 565

3. Where A is indebted to B, and transfers to him as collateral security a receipt given to A for a note for collection, it being for a larger amount than A's debt to B; and the bailee, who has the note for collection, with

- knowledge of the transfer and consenting thereto, permits it to go into the possession of A, who collects it and pays B a portion of his debt, the measure of damages in an action of trover by B against the bailee, is the unpaid portion of B's debt from A. As B would not be liable over to A for any balance, his claim for damages is limited to the amount of his special property in the note. *Sheldon vs. So. Ex. Co.*..... 625
4. Where, in view of the previous rulings of the Supreme Court, it appears that a case was brought up merely for delay, damages will be awarded. *Eagle Manf. Co. et al. vs. Wise*..... 630
5. Where plaintiff in error seeks to withdraw the writ of error, the record will be opened, on motion of defendant in error, for the purpose of hearing his claim for damages. *Ibid.*

DEBTOR AND CREDITOR.

1. Where a party is solicited to make a loan, and to procure the means of so doing must spend time and incur trouble and expense in collecting the same from others, and does this at the request of the borrower, and upon his agreement to pay for such services and expenses, the transaction is not usurious. *Atlanta Mining and Rolling Mill Company vs. Gwyer*..... 9
2. Where an excess over the legal interest is paid for other good and valuable consideration beyond the mere use of money, it is not usury. *Ibid.*
3. One creditor holding a common law judgment, where the debtor is involved or unable to pay all his debts, cannot enjoin another creditor in a common law judgment older than the first, on the ground that the latter had received from the debtor a sufficient amount of usury to discharge his existing judgment, and, from that fact, ask a decree, either that such judgment be declared satisfied, or postponed until the senior judgment is paid. *Phillips et al. vs. Walker*..... 55
4. Where it is claimed by the junior judgment creditor of a debtor, who is unable to pay his debts, that the holder of the oldest judgment purchased another judgment younger than either of the others, for about one-fifth the amount, under an agreement that the debtor was to have the benefit of the surplus, and, by agree-

ment between the creditors, they released their judgment liens on a certain portion of the debtor's property, which the debtor was to sell and pay a large portion of the proceeds to the creditor who held the oldest execution, and it was so sold and nearly all the portion paid to said creditor, applied to the payment of the whole of the judgment so purchased by him, and on the hearing of an injunction to restrain such creditor from selling the balance of the debtor's property, under the oldest *fi. fa.*, and claiming the whole of the proceeds under it, and asking that the money so appropriated shall be credited to the oldest execution, the evidence being conflicting, and the Chancellor grants the injunction, this Court will not interfere with his discretion in so doing. *Ibid.*

DEED.

1. Where the issue was, whether or not the deed under which defendant held the land, failed by mistake to cover the number of feet actually sold, it was competent for a witness to testify that the lot was sold as it stood in the inclosure at the time. *Bridwell et al., adm'rs, vs. Brown*..... 179
2. It was competent for a witness to testify that plaintiffs' intestate had offered him the lot in his shoe shop for \$300 00, but the trade was not made then; that plaintiffs' intestate and the purchaser, under whom defendant held, then left, and the purchaser came back afterwards and told him he had bought the lot, but he had to throw in a pair of footed boots, the answer having been drawn out by plaintiffs, and tending to show the place where the sale was consummated. *Ibid.*
3. It was competent for a witness to testify that plaintiffs' intestate, the purchaser and witness were on the lot together examining it previous to the consummation of the trade, that the lines were pointed out by plaintiffs' intestate, and marked by the fence then around it, as tending to show what was the intention of the parties to the contract, and whether there was either fraud or mistake in the execution of the deed. *Ibid.*
4. A mistake in a deed, to be corrected, must have have been made at the time of the execution. *Ibid.*

5. Where the issue upon trial was, whether a deed made by the grantor under which property acquired by his first wife, is conveyed away to the exclusion of his child by her, and under which the fee simple title is conveyed to his daughter by his second wife and the children of his brother, was the result of monomania and the improper influence exercised by his brother, which deed the grantor subsequently had taken up, and which he again confirmed, it was not error in the Court to allow a witness to testify that some time between the execution of the deed and the death of the grantor, he had heard him (the grantor) say that his brother was trying to get him to convey to the brother's children said property, which came by his first wife, and that he asked witness' advice about it; that at the time the brother was present with some papers he was endeavoring to induce the grantor to sign. *Lemon, ex'r, et al. vs. Jenkins et al.*..... 313
6. Upon such an issue it was not error for the Court to charge the jury that if the grantor, at the time of the execution of the first deed was laboring under monomania, caused by the marriage of his daughter, and the deed was the result of that monomania, they should set it aside. *Ibid.*
7. The recitals in a deed only bind the parties to that deed and those claiming under them, but are not evidence against one who does not claim under any of the parties to it, either as a privy in law or as a privy in estate, but under a title wholly independent of them. *Lamar et al. vs. Turner et al.* 329
8. There being no evidence that the title to the land sued for has ever passed out of the drawer, except as contained in the recitals of a deed made by the heirs-at-law of the drawer to the plaintiffs, the deeds constituting the chain of title from one to whom the property was alleged to have been conveyed in said recitals, by the drawer, were properly excluded as against the defendants who claimed under a distinct and independent title. *Ibid.*
9. The statements of the local agents of an express company to the grantor, pending negotiations between said company and said grantor, for said company to release the grantor's son, who was under arrest for embezzlement, upon the execution of a deed conveying certain

land to the company, are admissible upon the trial of an action of ejectment by the company for said land. *Southern Express Company vs. Duffey*.....



10. A mother made a deed to procure a release of her son from arrest on a charge of felony, to-wit: for embezzling money in his hands as the messenger of an express company. The expressed consideration of the contract was the repayment by her of the money embezzled by the son; but it was in proof that the son was under arrest and in chains, and the grantee in the deed agreed to release the son and stop the proceedings, though he expressly refused to settle the prosecution, saying he could not control the public authorities. The son was released and the proceedings stopped : *Held*, That the deed was illegal and void. *Ibid*.
11. When there are two deeds executed at different times by the same vendor to different vendees, and both are recorded, but neither of them within twelve months from its execution, the oldest deed has priority over the one subsequently executed. *Roe vs. Maund*..... 461

DISTRESS WARRANT.

See *Landlord and Tenant*, 3-5.

DOWER.

1. Where the only allegation in a bill seeking to enjoin the defendant from prosecuting her claim for dower, in the lands of which her husband died seized and possessed, was that she, "after possessing and enjoying the assets of said estate to a large amount in excess of her lawful dower, and wasting the same by pleading and otherwise, has made application to the Superior Court to set apart her dower in said estate," which charge was expressly denied by the defendant's answer, it was error in the Chancellor to direct that the writ of injunction should issue. *Kenan vs. Johnson*..... 28
2. The widow of the deceased testator had the legal right to her dower in one-third part of the land of which her husband died seized and possessed at the time of his death, unless that right was barred in the manner prescribed by the law. *Ibid*.

DRAFT. See *Bill of Exchange*, 1, 2.

DURESS.

See *Deed*, 9, 10.

“ *Promissory Notes*, 1.

EJECTMENT.

1. The recitals in a deed only bind the parties to that deed and those claiming under them, but are not evidence against one who does not claim under any of the parties to it, either as a privy in law or as a privy in estate, but under a title wholly independent of them. *Lamar et al. vs. Turner et al.*..... 329
2. There being no evidence that the title to the land sued for has ever passed out of the drawer, except as contained in the recitals of a deed made by the heirs-at-law of the drawer to the plaintiffs, the deeds constituting the chain of title from one to whom the property was alleged to have been conveyed in said recitals, by the drawer, were properly excluded as against the defendants who claimed under a distinct and independent title. *Ibid.*
3. By a marriage settlement a trustee was appointed and the property vested in him for the use of the wife, with power in the wife to dispose of the property by will, and if she died leaving children and without executing a will, then to those children and their legal representatives in equal degree. The trustee brought ejectment for a portion of the trust property laying a demise in his name as trustee for the wife and children. Pending the action the wife died :
Held, That the action did not abate, but that the same may be prosecuted for the recovery of the property, so that the trustee may be enabled to execute the trust by turning over the possession to those who may be entitled, and to that end may make such amendment and add such demises as may be necessary to make the children formal parties. *Findlay et al. vs. Artope, trustee* 537
4. Plaintiffs in ejectment introduced in evidence a deed for the premises in dispute, from Samuel Slater to Ann Slater during her life, with remainder to her children by William Slater, and proved the death of their mother, Ann Slater. The deed bears date January 1st, 1849. Defendant introduced a deed dated De-

cember 4th, 1849, to the same premises, from Ann Slater and William Slater, her husband, to Elmore Manes, and one from the representatives of Manes to Waters, with a transfer of the last deed to defendant. It was not in evidence that Samuel Slater was ever in possession of the premises, nor had any title in him, nor that Ann Slater ever accepted the deed from him, or that she and her husband held under him, or recognized the title as ever being in him, nor that the deed was ever in the possession of Ann Slater, or of any one under whom defendant claims :

Held, That the evidence does not show a common *prop-
ositus* under whom both plaintiffs and defendant claim,
and that no title is shown in the plaintiffs to entitle
them to recovery. *Manes vs. Slater et al*..... 589

EMINENT DOMAIN.

- 1. Where a railroad company claims title to land, as hav-
ing been condemned under the provisions of its charter,
the burden of proof is upon the company to show a
strict compliance with its terms. *Mobley vs. Breed,*
lessee 44
- 2. Upon the trial of the issue as to whether land was
legally condemned under the provisions of the charter
of a railroad company, it was error to allow a witness
to testify that "the assessment was made in accordance
with the provisions of the charter, and all the notices
required to be served, were either served or waived by
the parties," although the original papers may have
been lost or destroyed. *Ibid.*
- 3. Where the authorities of a town destroy a house to
prevent the spread of a fire, and in so doing cause the
destruction of personal effects in said house, which
would not otherwise have been destroyed, the town is
liable to the owner of the goods for the damages, even
though the owner of the goods is only a tenant in the
house. *President and Council of Dawson vs Kuttner*.. 133

EQUITY.

- 1. A receiver appointed by a Chancellor to "collect" the
effects belonging to a corporation, a defendant in a suit
pending in chancery, has no authority to bring a suit
in order to get possession of the effects, unless he be
specially authorized so to do by the order of the Chan-

cellor, and if he bring such suit and fail to show the order, he cannot recover. *Screven, receiver, vs. Clark.* 41

2. F. contracted in writing with M. to convey to him by deed certain described land in the State of Alabama for a stipulated price, in two payments. F. was to put a good substantial ten rail fence around the land, and stake and rider the same, was to have the privilege of all the timber on the land after making said fence, and to have two years to remove the timber. M. was to have possession when the first payment was made, which was fixed at a given day, and was to leave and keep open a certain road, so that F. could have free access to the timber. Both parties signed the contract. F. filed his bill for specific performance, etc., alleging that he had made the fence around the land, was ready, willing, and offered to perform the balance of his contract, and that M. refused to pay any portion of the purchase money, or receive possession of the land:

Held, That the Court erred in dismissing the bill for want of equity. *Forsyth vs. McCauley*..... 402

3. The stockholders of a chartered loan and building association agreed unanimously, at a period long antecedent to the time when, by the rules of the company, it would close, to cease operations and settle their mutual relations on principles of equity. At the same meeting a majority of the stockholders adopted by vote a scheme of settlement, which repudiated, as a basis, the rule of crediting each stockholder with his payments and legal interest thereon, and charging him with his receipts and legal interest, but was based upon an arbitrary compromise of the assumed rights of the borrowers and non-borrowers, under the charter, in its ordinary working. A large minority of the stockholders protested against this scheme, and filed a bill in equity, seeking to enjoin the officers of the corporation from carrying out said scheme, and praying that the rights of the parties should be ascertained and the assets disposed of by the Court on principles of equity, which the bill claimed simply required each stockholder to be credited with his payments and legal interest and charged with his receipts and legal interest:

Held, That even though the rules of the company under the charter were not obnoxious to the laws against usury, still, as by common consent it was agreed that the com-

pany was now to wind up, and as the contracts of the parties must therefore of necessity be set aside, and the rules of the charter disregarded, it was not competent for the majority to adopt a scheme repudiating the rate of interest prescribed by law between persons having moneyed dealings with each other, and that the injunction was therefore properly granted. *City Loan and Building Association of Augusta vs. Goodrich et al.....* 445

4. The cardinal rule for the settlement among the stockholders on principles of equity will be to charge each stockholder with his receipts and interest on them from the time of the receipt, and to credit such stockholder with his payments and interest from the date of the same, according to the rules of law for such calculations, to divide the assets according to the result, subject, of course, to such equitable modification and adjustment as to expenses, losses, etc., as may appear equitable from the proof at the trial. *Ibid.*
5. The injunction prohibiting the officers from carrying out the plan adopted by the majority ought not to hinder the collection of the debts due by the forfeiting stockholders. *Ibid.*
6. Under the prayer of the bill it is the duty of the Chancellor to take such order as will insure the speedy payment of the balances due and the collection of the assets, including any insurance policies that the company may own or may hold as collaterals, according to the rights of the parties in each case, as well as balances due by stockholders, as debts due by persons who had forfeited their stock before the date of the assessment, as will insure the speedy preparation of the whole matter for a final decree. *Ibid.*
7. Defendants in equity cannot, at the same time, charge and discharge themselves by their answer. *Westbrook, trustee, vs. Davis et al.....* 471
8. The Court should instruct the jury as to what was and what was not responsive to the bill, in order to make it evidence for the defendants. *Ibid.*
9. When it appears from the papers on file with the clerk of the Superior Court of this State that, in a case carried by writ of error from this Court to the Supreme Court of the United States, proper steps have been taken to supersede the judgment, the Courts of the

State have no longer jurisdiction of the case until the same is disposed of by the appellate Court, or until, by order of said Court, the execution is permitted to proceed for want of a *supersedeas* or otherwise. The remedy at law, by affidavit of illegality, is adequate to stop the progress of the execution, and a bill to enjoin them was properly demurred to, as the defendant has a complete and adequate remedy at law. *Russell vs. O'Dowd et al; O'Dowd vs. Russell et al* 474

10. A testator directs his executor "to pay an annual sum of \$500 00 to his wife, out of the net income of his estate, in semi-annual installments." In another item of his will he refers to this bequest as an "annuity devised to his wife." Nothing else in the will defines or limits the term of years during which it is to be paid. In four several items of his will he further gives, after deducting the foregoing annuity, one-fourth of the annual income arising from his estate to four several sets of legatees. For three of said shares in the income trustees are appointed. The fourth share is to be paid on certain conditions, with a remainder created therein. No time is appointed for the distribution of the estate, or the payment of any share thereof, except as to the income. The widow applied for dower in the land and the same was assigned to her. Subsequently she executed an agreement with the legatees whereby she relinquished her dower "to the estate and legatees," on condition that the legatees paid her *during her life* the annuity given her by the will, and agreeing that the estate might be distributed, but the relinquishment to be void if the Courts would not decree a distribution. This the legatees and the trustees appointed in the will agreed in writing to do. The executor was one of the trustees. The beneficiaries of the trusts are *femes covert*, and their children born and to be born. The executor filed a bill in chancery alleging the foregoing facts, further stating that the conditions on which the fourth share in the annual income was to be paid had happened, and asked the direction of the Chancellor as to the execution of the will, that the property might be divided and turned over to the legatees and trustees "on the same basis, terms, conditions and limitations as the annual income had been given," etc., and that the right of the widow to the annuity might be secured by a proper decree. To this bill the

widow, the trustee, etc., were parties, and their answers admitted the facts as stated and joined with the executor in asking the decree prayed for. On the hearing, the Court, after the reading of the bill and answers, dismissed the bill for want of equity.

Held, That the rights of the annuitant, under the agreement, and the liabilities of the respective shares for its payment, the condition attached to the relinquishment of dower, and the beneficiaries of said relinquishment and of the estate being mostly *femes covert* and children born and to be born, and who take the estate through trustees, make this a proper case for invoking the aid and direction of a Court of equity, in order that the rights of all parties may be finally adjudicated, and all doubts as to the proper construction of the will, and as to the time when the distribution of the estate can be made, may be removed, this Court holding that the gift or bequest of the income carries with it the *corpus*, under the limitations provided in the will.

Hill vs. Clarke et al...... 526

11. In 1860 A bought of B a tract of land near which he had lived for some years, paying part of the purchase money, giving his note for the remainder, and going into possession and into the use of the land, and in 1867 permitted judgment to go against him for the balance of the purchase money; and in 1872 filed a bill in equity, setting up that A, at the time of the original sale, had falsely represented that a certain portion of the land, which was low ground, had been ditched and was then in cultivation, was capable of being kept dry and fit for cultivation, when, in fact, as experience had proved, this was not possible, as after a few years it had become unfit for use, and so continued. The bill set up that B was insolvent, and prayed that the execution which the bill claimed was for no more than the damage caused by the false statements of B might be enjoined:

Held, That the Judge did not err in refusing a temporary injunction and in dismissing the bill for want of equity. *Hambrick vs. Dickey et al.*..... 578

12. Where three distinct suits are proceeding in favor of different parties on the same claim, two of them being for the whole claim, and the third for a large part thereof, against the same defendant, and the trial of

each case would involve an investigation into long and complicated accounts, running through a series of years, to the amount of hundreds of thousands of dollars, equity will consolidate them, and by one decree dispose of the litigation. *Wilson & Co. et al. vs. Riddle*..... 609

ESTOPPEL.

1. Where land was sold under a judgment obtained against the defendant in the United States District Court, of older date than the levy of an attachment returnable to a Superior Court of the State, but the levy of the execution, based upon said judgment, was made after the levy of said attachment, and the plaintiff in attachment was present at the marshal's sale when the claimant purchased, and made no objections, the purchaser obtained a valid title. *Studdard vs. Lemmond*..... 100
2. Where one bought a negro slave at sheriff's sale, and permitted him to remain with defendant to use as his own, and he was so used for years, persons dealing with said defendant with no knowledge of who is the true owner, have a right to consider the slave as the property of the person thus "using him as his own." *Redd, ex'r, vs. Muscogee Railroad Company*. 102

EVIDENCE.

1. Upon the trial of the issue as to whether land was legally condemned under the provisions of the charter of a railroad company, it was error to allow a witness to testify that "the assessment was made in accordance with the provisions of the charter, and all the notices required to be served, were either served or waived by the parties," although the original papers may have been lost or destroyed. *Mobley vs. Breed, lessee*..... 44
2. The sworn copy of original proceedings, produced by a witness in Court, is better evidence than his oral declarations. *Ibid.*
3. Where the defense set up to a suit on the note, is that the money for which said note was given, was borrowed for the illegal purpose of aiding and encouraging the rebellion, it is competent for defendant to prove a conversation between himself and plaintiff, in which

- defendant stated to him that he knew the money was borrowed for the purpose of aiding and encouraging the rebellion, and that he (plaintiff) did not deny this allegation. *Dixon, adm'r, et al. vs. Edwards*..... 142
4. Where a part of a conversation is placed in evidence, the whole is admissible. *Ibid.*
 5. Where an administrator is sued as such, and as security upon the note made by his intestate, the statements made to him by his intestate in reference to the matter in controversy are inadmissible. *Ibid.*
 6. Where the issue was, whether or not the deed under which defendant held the land, failed by mistake to cover the number of feet actually sold, it was competent for a witness to testify that the lot was sold as it stood in the inclosure at the time. *Bridwell et al., adm'r, vs. Brown*..... 179
 7. It was competent for a witness to testify that plaintiffs' intestate had offered him the lot in his shoe shop for \$300 00, but the trade was not made then; that plaintiffs' intestate and the purchaser, under whom defendant held, then left, and the purchaser came back afterwards and told him he had bought the lot, but he had to throw in a pair of footed boots, the answer having been drawn out by plaintiffs, and tending to show the place where the sale was consummated. *Ibid.*
 8. It was competent for a witness to testify that plaintiffs' intestate, the purchaser and witness were on the lot together examining it previous to the consummation of the trade, that the lines were pointed out by plaintiffs' intestate, and marked by the fence then around it, as tending to show what was the intention of the parties to the contract, and whether there was either fraud or mistake in the execution of the deed. *Ibid.*
 9. Where a note for \$1,488 00 was made in 1864, and after the conclusion of the late war, was stamped with a five cent revenue stamp, the holder estimating it as worth \$100 00, it was properly admitted in evidence. *Kile vs. Johnson*..... 189
 10. Under these circumstances, it was not error to admit evidence under which the plaintiff might recover more than \$100 00 on the note. *Ibid.*

11. On a trial for seduction, acts, and sayings between the parties, bearing upon the principal fact, both before, at the time of, and after, are admissible in evidence as inducement, as part of the *res gestæ*, and as explanatory and in mitigation or exculpation of the principle fact. *Wood vs. The State*..... 192
12. The recitals in a deed only bind the parties to that deed and those claiming under them, but are not evidence against one who does not claim under any of the parties to it, either as a privy in law or as a privy in estate, but under a title wholly independent of them. *Lamar et al. vs. Turner et al.*..... 329
13. There being no evidence that the title to the land sued for has ever passed out of the drawer, except as contained in the recitals of a deed made by the heirs-at-law of the drawer to the plaintiffs, the deeds constituting the chain of title from one to whom the property was alleged to have been conveyed, in said recitals, by the drawer, were properly excluded as against the defendants who claimed under a distinct and independent title. *Ibid.*
14. The statements of the local agents of an express company to the grantor, pending negotiations between said company and said grantor, for said company to release the grantor's son, who was under arrest for embezzlement, upon the execution of a deed conveying certain land to the company, are admissible upon the trial of an action of ejectment by the company for said land. *Southern Express Company vs. Duffey*..... 358
15. Where A. sues H. as bailee for money deposited with him for safe keeping, and H., who was a partner in business with B., the husband of A., sets up that the money was put into the partnership by B., it was not error in the Court to decline to charge, at the request of H., that if the claim of A. be true, yet if B. put the money into the concern of H. and B., the suit should have been brought against B., or against H. and B. The non-joinder of B. should have been pleaded in abatement, in order for H. to avail himself of it. And H. was not entitled to the charge as to the suit being brought against B. individually, unless it had contained the qualification that H. did not know the money belonged to A., when it was so put into the concern of H. and B. In such a suit, a receipt from

- B. to H., showing a dissolution of the firm, which had already been proven, and a settlement between them of the partnership business was immaterial testimony, and could not affect the rights of A. *Hewitt vs. Brummel* 481
16. Where the questions as to whether the note, which was the basis of the judgment from which the execution issued, was given for Confederate money or in renewal of another note, only become material in connection with whether the taxes have been paid, and this issue was not made by the affidavit of illegality, it was not competent to introduce testimony upon these points. *Sullivan vs. Hugely* 486
17. When a suit was pending on a promissory note dated January 1st, 1860, for \$240 00, due one day after date, made by C. McCalla, with a memorandum on the back thereof as follows: "The within note to be paid when C. McCalla collects a certain note on Thomas Pledger for \$251 00." And it was in proof by a witness who was present when the note was made, that it, "the note, was given for a note the payee had on Pledger, which C. McCalla was to collect; when collected he was to pay the note sued on. The payee was to pay C. McCalla for his services. The memorandum was made at the same time as the note:"
- Held*, That these facts were proper to be considered by the jury in determining what the parties meant by the note and memorandum, and that it was error in the Court to charge the jury that they could only consider it as it tended to show fraud or want of consideration. *McCalla vs. McCalla* 502
18. When there was a trial of a suit for damages for killing the plaintiff's cow against a railroad company, and the declaration claimed as a part of the damages, expenses of litigation, under section 2801 of Irwin's Revised Code:
- Held*, That it was not error in the Court to permit the plaintiff to prove "that he offered to compromise, that they refused and offered to pay him \$30 00. He refused to take \$50 00, but was willing to settle without suit." *Selma, Rome and Dalton Railroad Company vs. Fleming* 514
19. The admissions of the husband, offered as evidence by the wife for the purpose of showing, in connection with

- other testimony, that the marriage was void, and thereby to relieve herself from any effect that his assent to such compromise might have, were properly rejected by the Court, as they are immaterial under the construction given to the Act of 1866. *Johnston vs. Janes et al* 554
20. An exemplification of the returns of a guardian to the Ordinary, though made several years after the actings of the guardian therein contained, and after the commencement of suit against him by his ward, are admissible in evidence when tendered by him, and such facts are circumstances, which, with the other testimony in connection therewith, may be considered by the jury in determining the weight to be given to it. *Ibid.*
21. It was not error in the Court to rule out as evidence an answer of a witness taken by interrogatories as follows: "But knows that the general report was that G. K. Smith owned it, (a store-house,) and had used it for several years"—nothing else appearing in the answer to show that the "report" did not apply to the using as well as the ownership. *Willingham et al. vs. Smith*..... 580
22. Where possession in the vendor after the sale, was claimed as a badge of fraud, it was competent for a witness to testify that she heard the vendee some time after the sale say to the vendor, "he might have possession of the house free of rent if he would pay taxes and keep up repairs." Although no reply was proven to have been made to the proposition, the fact that the vendor did continue in possession for several years, entitled the party offering the evidence to have it to go to the jury for what it was worth. *Ibid.*
23. The entries on the sheriff's docket, (the sheriff being dead,) showing the payment of an execution by the security, are admissible in evidence, it being made to appear that the original execution was lost and the record of the judgment being produced. *Ibid.*
24. When, in a pending suit between A and the administrator of A's deceased father-in-law, in relation to certain money loaned by the son-in-law to the deceased, and two other of the deceased's children testified of a settlement between the parties, giving the de-

tails of it, and, in answer to cross-interrogatories, said that they were not present, and that all they knew of it they got from family conversations, the witness not recollecting that A was present at any of said conversations, but giving his opinion that he was:

Held, That it was error to permit the answers as to the asserted settlement to be read as evidence to the jury.

Thomas vs. Whitehead, adm'r..... 587

25. When parties make an express contract which is plain, evidence of usage and custom is inadmissible to control, vary or contradict it. *Park & Iverson vs. Piedmont and Arlington Life Insurance Company*..... 601

26. Where, during the trial of a case, it becomes necessary to prove the general custom in the life insurance business as to the commutation of renewals in favor of discharged agents, the proper question would be, "What is the general or universal usage and custom in the life insurance business as to the commutation of renewals," etc.? *Ibid*.

27. On the trial it was competent for the bailee to prove that when he was notified by A and B, who were together, of the transfer, he was not informed that it was made as collateral security, but, on the contrary, it was stated by A that the transfer was made only that the money might be paid to B in the event that A was absent, as he expected to be absent, provided B was present when such a statement was made. *Seldon vs. Southern Express Company*..... 625

28. Under the facts as they appear in the record, it would have been proper to have submitted the question to the jury whether B was present at the time A made the statement to the bailee's agent. *Ibid*.

29. In 1862, Roath purchased lot number forty-five, in the city of Augusta, with a front of sixty feet, and running from Ellis to Greene street, and was residing on it when, in March, 1866, he purchased lot number forty-four, a vacant lot adjacent to number forty-five, of the same front and running the same length as number forty-five. He used part of lot number forty-four as a flower garden, and part as a vegetable garden. There was a fence around both lots, and a fence divided them when Roath purchased forty-four, and the evidence is conflicting as to the time when the dividing fence was taken down by Roath, whether it was before

or after the execution of his will. In September, 1866, Roath made his will, and in one item "devised and bequeathed my house and lot on Ellis street, in the city of Augusta, where I now reside, to my wife for her natural life, and after her death, to my two nieces, M. and S. B. Crocker." In another item, he gave all the balance of his estate, real and personal, to his wife, absolutely. Testator died in November, 1867:

Held, That the acts and sayings of Roath, which go to show that, at the time of the execution of the will, he considered and treated the two lots as one and as constituting the house and lot where he then resided, are competent as evidence in behalf of the remaindermen in an action of ejectment brought after the death of the wife of Roath to recover lot number forty-four. *McElrath vs. Haley et al.*..... 641

31. The widow of Roath had built a house on forty-four, had married again and died, and the action was against her second husband. On the trial, one of the plaintiff's testified, by interrogatories, that the widow of Roath, some time after the building of the house, said to her, (plaintiff,) "She was a fool for building the house, and if she had her way she would tear it down, if she could get her money back." And further testified, over defendant's objection, "She also said she had been to see her lawyers, Barnes & Cumming, and they told her * * * she offered, if we would do this to give up the house on Ellis street, but this was never done:"

Held, That it was error to admit that portion of the testimony objected to by defendant. If it was an offer of compromise, it was illegal testimony. If otherwise admissible, the whole of what she said should have been stated, and if stated, should have gone to the jury. *Ibid.*

EXECUTION.

1. When money was raised by the the sheriff under a *fi. fa.* in favor of A, against B, and C, the holder of an older *fi. fa.*, placed the same in the hands of the sheriff to claim the money, and gave him notice to hold the money for distribution by the Court, and the defendant instituted proceedings under the Relief Act of 1868, to reduce the older judgment, and pending these proceedings, though under the belief that they had been abandoned, the sheriff had paid the money over to the

older *fi. fa.*, which had in the meantime, been purchased by A, the holder of the younger *fi. fa.*, and the proceedings to reduce the other judgment were afterwards abandoned by the defendants:

Held, That it was error in the Court, on the motion of the defendant, to direct the money thus paid upon the older *fi. fa.* to be indorsed, as a credit upon the younger *fi. fa.* *Moses vs. Flewellen*..... 23

2. Before the passage of the Act of August 24, 1872, there was no authority in any officer to transfer an execution for taxes so as to entitle the transferee to enforce the same by levy and sale of the property of the defendant. *Smith vs. Mason*..... 177

3. When a mortgage *fi. fa.*, for the sale of a parcel of land was, under the orders of the plaintiff's attorney, levied on the land, and the same was sold at sheriff's sale, and the money raised applied to the *fi. fa.*, and subsequently, on a statement that the *fi. fa.* was lost, the plaintiff procured an alias *fi. fa.* to issue (taking no notice of the sale) and caused it to be again levied on the land, and a claim was interposed by one claiming under the defendant in the mortgage:

Held, That the claimant may attack the plaintiff's *fi. fa.* by showing that the order had been complied with, and the land sold according to its commands, and that it was not competent for the plaintiff in reply to show that said sale was illegal, it having been made whilst there was a pending injunction prohibiting said *fi. fa.* from proceeding. The Court will not permit the plaintiff to set up his own wrong; said sale and the return thereof are existing facts, and until set aside by a proceeding for that purpose cannot be treated as null by the very party who thus disobeyed the order of the Chancellor. *Horton & Rikeman vs. Kohn*..... 183

4. When it is directed in a will that the estate of the testator shall be equally divided between his five children "after deducting a portion off of the shares of William J. and Caroline E." equal to what had been advanced to them, and it appears from an agreed statement of the facts, that the executor (the only one surviving) came into the possession of a certain lot, in the city of Augusta, as such executor, and as the property of the testator, and that the will had not been executed as to this lot and other property of the estate:

- Held*, That the interest William J. and Caroline E. may have in said lot is not subject to levy and sale under a judgment and execution obtained against said William J., and the husband of Caroline E., for a debt due from them. *Clarke, ex'r, vs. Harker*..... 596
5. In one item of a will executed in 1840, (the testator dying shortly afterwards) property is given to his executors in trust for all the children of testator—including a married daughter, and the husband of such daughter being one of the executors—"for their sole and separate use during their natural lives and to remain to their children after their death;" and in the next item of the will two of said executors (omitting the husband,) are appointed trustees for said married daughter, and it is immediately added, "and that her estate be held by them for the sole use and benefit of the heirs of her body:"
- Held*, That both items will be considered in construing what estate was intended to be given to such daughter, and that an estate in trust for her sole and separate use is thereby created and is not subject to levy and sale for the debts of her husband. *Ibid.*

EXECUTOR DE SON TORT.

See *Administrators and Executors*, 2.

FACTORS.

1. Delivery of produce to a common carrier, consigned to factors, under a contract before that time made, is such a delivery to the latter as will cause their lien to attach for advances made. *Elliot vs. Cox et al*..... 39
2. To create a lien under the 1977th section of Irwin's Revised Code, and to have the same enforced upon the growing crops of farmers, the plaintiff must allege in his affidavit, that he is either a factor or a merchant, and that as such, he has furnished either provisions or commercial manures, or both upon such terms as may have been agreed upon by the parties. *Gunn et al. vs. Pattishal*..... 405
3. An execution based upon an affidavit not containing the aforesaid allegations, is void, and the plaintiff who directed the levy, and the sheriff who levied the same upon the property of defendant, were trespassers, and liable for damages as such. *Ibid.*

FINE.

1. Where a defendant is convicted of a misdemeanor and the judgment is that he do pay a specified fine and costs of prosecution, and he refuses to pay the fine and costs, the Judge has the power to order the clerk of the Court to issue an execution against the property of the defendant to enforce the collection of the fine and costs. *McMeekin vs. The State*..... 335
2. If, in addition to the fine, etc., the judgment directs that the defendant shall be held in custody until the fine and costs are paid, so that the imprisonment do not exceed six months, and the defendant is so held in custody and discharged at the termination of six months, without payment of the fine or any of the costs:
Held, That the imprisonment was no part of the penalty, and the power still existed in the Court to order the issue of the execution to collect the fine and all the costs. *Ibid*.

FORCIBLE ENTRY AND DETAINER.

1. When there was a trial before a jury, on a warrant for forcible entry and detainer, and the entry and force by the defendant were admitted, but it was set up that the plaintiff was holding as the tenant of the defendant, and there was evidence upon both sides upon the point, in the main by the parties themselves as witnesses, and the jury found for the plaintiff, under a charge of the Court telling them that the case turned upon the nature of the plaintiff's holding, whether in his own right or as tenant, and the jury found for the plaintiff, this Court will not overrule the Court below in refusing to order a new trial unless the verdict be most manifestly contrary to the evidence. *Monroe et al. vs. Carter*..... 174
2. A warrant for forcible entry only, which shows upon the face that the entry was more than three years before the issuing of the warrant, and which contains no allegation or charge of the forcible detainer, is demurrable as insufficient in law, and should be dismissed on motion, since the statute, in terms, provides that in no case shall the person in possession be turned out, if he has been three years in peaceable possession of the premises. *DeLagal vs. Wallace, adm'r*..... 408

FRAUD—POSSESSION BADGE OF.

See *Vendor and Purchaser*, 5.

FRAUDS, STATUTE OF.

Where a parol contract was made in November, 1865, for the rent of a plantation for the year 1866, and the defendant went into possession of the place, in pursuance of the contract, and cultivated it for the year 1866, this is such a part performance of the contract as will take it without the operation of the statute of frauds. *Rosser vs. Harris*..... 512

GARNISHMENT.

1. A foreign corporation transacting business in this State, may be garnished for a debt it may owe, anywhere in this State where suit for such debt could be brought. *Selma, Rome and Dalton Railroad Company vs. Tyson*..... 351
2. Where an attorney at law, in response to a summons of garnishment issued at the instance of a judgment creditor, answers that he has a certain sum of money in his hands belonging to the defendant, which, before he was served with such summons, he had decided to appropriate towards the satisfaction of other judgments than that upon which the process of garnishment issued, but had not actually done so, because he was awaiting the consent or refusal of the defendant to such action, it was not error in the Court to order the fund paid to the oldest execution, after allowing reasonable attorney's fees and costs to the diligent creditors bringing the fund into Court. *Carr vs. Benedict, Hall & Co*..... 431
3. At the same term at which judgment was obtained against the principal debtor, a defaulting garnishee moved the Court, after the discharge of the jurors, to be allowed to file his answer denying any indebtedness, and for cause why the answer was not filed before, showed that the original defendant had been, before that time, in a case of involuntary proceedings in bankruptcy, adjudged a bankrupt; that a new trial had been granted, and the proceedings in bankruptcy were still pending:

Held, That the Court did not abuse his discretion in permitting the answer to be then filed. *McCallum & Bro. vs. Brandt* 439

GIFT.

To make out a case of a presumptive gift of lands, under section 2622 of Irwin's Revised Code, it is necessary to show that the exclusive possession of the child, without payment of rent, shall have continued seven years during the lifetime of the father, and if he (the father) die before the seven years is complete, the presumption provided for does not exist. *McKee vs. McKee et al.* 332

GUARDIAN AND WARD.

1. Samuel C. Hitchcock having been appointed guardian of Irby Hudson, by the Ordinary of Sumter county, moved his guardianship, in terms of the law, to Hancock county. On the arrival of Hudson at the age of fourteen years, Hitchcock was, by petition, removed on the ground that Hudson was now fourteen years old, and had chosen another guardian. This was done in the county of Hancock. Soon after, A. J. S. Jackson was appointed guardian of Hudson, whose residence was then in Greene county. Jackson, the new guardian, cited Hitchcock, who resided in Fulton county, before the Ordinary of Greene county, to account. Hitchcock acknowledged service of the citation, but did not appear, and on an *ex parte* hearing the Ordinary gave a judgment against Hitchcock. An execution was issued and levied, and Hitchcock filed an affidavit of illegality on the ground that the Ordinary of Greene county had no jurisdiction to call him to account:

Held, That as the Ordinary of Greene county did not have the record of Hitchcock's guardianship, and as Hitchcock had never been appointed by him or been in any way subject to his jurisdiction, said Ordinary had no power to call him to account or to give a judgment against him. *Jackson vs. Hitchcock*..... 491

2. If a guardian purchase land, intending to receive a promissory note on other parties, from an administrator in whose hands is the estate in which his ward has a share, and to pay for the land with such note, the consideration of which, is the purchase money of the

same land when sold by the administrator, and he does receive the note from the administrator as the portion of the ward in said estate, and pays the whole price of the land with it, and takes the title to himself, it will so charge the land as a trust in the hands of the guardian, and his vendee who purchases with notice of such facts, as to entitle the ward through her next friend to assert her right of election between the fund thus appropriated, and the land thus purchased and paid for. *Johnston vs. Janes et al.*..... 554

3. Under the proper construction of the Act of 1866, securing to the wife the property she had at marriage, or that may come to or be acquired by her during coverture, a guardian cannot make a compromise or accord and satisfaction with his female ward and her husband for her claim against him as her guardian, she being at the time a minor and having married after the passage of said Act. *Ibid.*
4. If such compromise be made whilst suit is pending against the guardian in favor of his ward by her next friend, without the authority of the Court or the knowledge and consent of the next friend, it is so far a nullity that no deduction from the claim against the guardian can be allowed for what he may advance as a consideration for the compromise, unless it be shown that the same was applied for the use and benefit of the ward. *Ibid.*
5. The admissions of the husband, offered as evidence by the wife, for the purpose of showing, in connection with other testimony, that the marriage was void, and thereby to relieve herself from any effect that his assent to such compromise might have, were properly rejected by the Court, as they are immaterial under the construction given to the Act of 1866. *Ibid.*
6. An exemplification of the returns of a guardian to the Ordinary, though made several years after the actings of the guardian therein contained, and after the commencement of suit against him by his ward, are admissible in evidence when tendered by him, and such facts are circumstances, which, with the other testimony in connection therewith, may be considered by the jury in determining the weight to be given to it. *Ibid.*

HOMESTEAD.

1. It is not sufficient to make a mortgage lien good against a homestead and exemption, under the Act of 1868, that it was given in lieu of another mortgage on the property, unless it further appear that the first mortgage or lien was a lien superior to the right of homestead. There is nothing in the record which shows that the original lien or mortgage was good, in spite of the homestead, either by the laws of Alabama or Georgia. *Griffin & Clay vs. Treutlen*..... 148
2. The rent of a house and lot wholly disconnected from the homestead is not one of the exceptions mentioned in the Act of 1869, for which the produce, rents or profits of the homestead is liable. *Huff vs. Bournell*. 338
3. The term "necessaries," as used in said Act, refers to such necessities as have been furnished to the family in connection with the enjoyment of the homestead property, such as were necessary for them in the cultivation of the crops raised thereon, and for the support of the family whilst so doing. *Ibid.*
4. Under the decision of the Supreme Court of the United States, in the case of *Gunn vs. Barry*, the homestead clause of the Constitution of 1868 is in violation of the Constitution of the United States, in so far as it authorizes the homestead and exemption therein provided for to be set up against contracts made before the adoption of said Constitution of 1868. *Jones, adm'r, vs. Brandon*..... 593

HUSBAND AND WIFE.

See *Guardian and Ward*, 3-5.

ILLEGALITY.

1. Where suit is instituted against trustees for advances alleged to have been made to one of the *cestui que trusts*, with the assent of the defendants, for the use of the trust estate, and a general judgment is taken against the trustees, and the execution based thereon is levied upon the trust estate, the *cestui que trusts* not being parties to the execution, could not file an affidavit of illegality. *Clinch et al. vs. Ferril & Weslow et al.*..... 365

2. When the maker and indorser of a promissory note are dead, and the administrator of the maker is also executor of the indorser, and suit is brought on the note against him in both capacities, though the judgment does not specify the relation of maker and indorser, it is good against him, at least, so far as he is the representative of the maker, and if levy be made accordingly, he cannot arrest it on that ground by affidavit of illegality. *Woolfolk, adm'r and ex'r, vs. Kyle*..... 419
3. When it appears from the papers on file with the clerk of the Superior Court of this State that, in a case carried by writ of error from this Court to the Supreme Court of the United States, proper steps have been taken to supersede the judgment, the Courts of the State have no longer jurisdiction of the case until the same is disposed of by the appellate Court, or until, by order of said Court, the execution is permitted to proceed for want of a *supersedeas* or otherwise. *Russell vs. O'Dowd et al.; O'Dowd vs. Russell et al.* 474
4. The remedy at law, by affidavit of illegality, is adequate to stop the progress of the execution, and a bill to enjoin them was properly demurred to, as the defendant has a complete and adequate remedy at law. *Ibid.*
5. Where no ground of illegality to an execution is based upon the fact that no affidavit of the payment of taxes had been filed by the plaintiff, the levy will not be dismissed on motion, on account of its absence. *Sullivan vs. Hugely*..... 486
6. Where the questions as to whether the note which was the basis of the judgment from which the execution issued, was given for Confederate money or in renewal of another note, only become material in connection with whether the taxes have been paid, and this issue was not made by the affidavit of illegality, it was not competent to introduce testimony upon these points. *Ibid.*
7. The acknowledgment of service of the citation was no waiver of the jurisdiction, and as Hitchcock did not appear or plead to the citation, the judgment was void, and the remedy by affidavit of illegality may be used to make the question of jurisdiction. *Jackson vs. Hitchcock*..... 491

IMPEACHMENT OF WITNESS.

See *Witness*, 1, 2, 4, 5.

INDICTMENT.

See *Criminal Law*, 6, 9, 10, 24, 40.

INDORSEMENT. See *Promissory Notes*, 1-4.

INFERIOR COURT. See *Ordinary*, 1.

IN PARI DELICTO. See *Confederate States*, 1, 2.

INJUNCTION.

1. Where the only allegation in a bill seeking to enjoin the defendant from prosecuting her claim for dower in the lands of which her husband died seized and possessed was, that she, "after possessing and enjoying the assets of said estate to a large amount in excess of her lawful dower, and wasting the same by pleading and otherwise, had made application to the Superior Court to set apart her dower in said estate," which charge was expressly denied by the defendant's answer, it was error in the Chancellor to direct that the writ of injunction should issue. *Kenan vs. Johnson*..... 28
2. The widow of the deceased testator had the legal right to her dower in one-third part of the land of which her husband died seized and possessed at the time of his death, unless that right was barred in the manner prescribed by the law. *Ibid.*
3. One creditor holding a common law judgment, where the debtor is involved or unable to pay all his debts, cannot enjoin another creditor in a common law judgment older than the first, on the ground that the latter has received from the debtor a sufficient amount of usury to discharge his existing judgment, and, from that fact, ask a decree, either that such judgment be declared satisfied, or postponed until the senior judgment is paid. *Phillips et al. vs. Walker*..... 55
4. Where it is claimed by the junior judgment creditor of a debtor, who is unable to pay his debts, that the holder of the oldest judgment purchased another judgment younger than either of the others, for about one-

fifth the amount, under an agreement that the debtor was to have the benefit of the surplus, and, by agreement between the creditors, they released their judgment liens on a certain portion of the debtor's property, which the debtor was to sell and pay a large portion of the proceeds to the creditor who held the oldest execution, and it was so sold and nearly all the portion paid to said creditor, applied to the payment of the whole of the judgment so purchased by him, and on the hearing of an injunction to restrain such creditor from selling the balance of the debtor's property, under the oldest *fi. fa.*, and claiming the whole of the proceeds under it, and asking that the money so appropriated shall be credited to the oldest execution, the evidence being conflicting, and the Chancellor grants the injunction, this Court will not interfere with his discretion in so doing. *Ibid.*

5. The granting or refusal to grant an injunction is vested by law in the discretion of the Judge of the Superior Court, to whom the application is made, and being so vested, it was manifestly intended that he should exercise that discretion on the statement of facts exhibited to him, and the Supreme Court will not interfere unless some well established rule of law, or principle of equity, has been violated. *Jones, Drumright & Co. vs. Thacher & Co. et al.*..... 83
6. Where an injunction was refused by the Chancellor, and the case, by writ of error, was carried to the Supreme Court and the judgment reversed, and defendants then moved before the Chancellor to dissolve the injunction, which motion was overruled, such decision cannot be carried by bill of exceptions to the Supreme Court within ten days, under the Act of October 28th, 1870. *Armstrong, administrator, et al. vs Lewis*..... 127
7. When a mortgage *fi. fa.* for the sale of a parcel of land was, under the orders of the plaintiff's attorney, levied on the land, and the same was sold at sheriff's sale, and the money raised applied to the *fi. fa.*, and subsequently, on a statement that the *fi. fa.* was lost, the plaintiff procured an alias *fi. fa.* to issue (taking no notice of the sale) and caused it to be again levied on the land, and a claim was interposed by one claiming under the defendant in the mortgage:

- Held*, That the claimant may attack the plaintiff's *fi. fa.* by showing that the orders had been complied with, and the land sold according to its commands, and that it was not competent for the plaintiff in reply to show that said sale was illegal, it having been made whilst there was a pending injunction prohibiting said *fi. fa.* from proceeding. The Court will not permit the plaintiff to set up his own wrong; said sale and the return thereof are existing facts, and until set aside by a proceeding for that purpose cannot be treated as null by the very party who thus disobeyed the order of the Chancellor. *Horton & Rikeman vs. Kohn*..... 183
8. In an application for an injunction to restrain a defendant from selling certain land, on account of fraud on the part of defendant in obtaining the title, the bill also praying relief and for the cancellation of the deed, and it does not appear that the defendant is insolvent, or threatening or offering to sell the land, and the evidence at the hearing on said application being conflicting as to the fraud, and the Chancellor refuses the injunction, this Court will not interfere with the decision of the Judge, the more especially as it does not appear that any irreparable damage can ensue to complainant from said refusal. If, whilst the suit is pending, the defendant were to sell the land, the complainant would only have to make the purchaser a party. *Smith vs. Malcolm*..... 343
9. An execution based upon a judgment against trustees which fails to specify the property to be bound for its payment, having been levied upon the trust estate, the sale will be enjoined. *Clinch et al. vs. Ferril & Wesslow et al.*..... 366

JUDGMENT.

1. The judgment of a District Court of the United States, having jurisdiction of the parties and the subject matter of the judgment, is conclusive between the parties in a State Court, upon the merits of the matter adjudged, but the jurisdiction of the Court is always open to inquiry. *McCauley vs. Hargroves, for use, etc.*..... 50
2. Where there is nothing in the action of the Court to show that the defendant was notified, and the judgment upon its face shows that the defendant did not

appear, and the return of the marshal is without any formal venue, and does not state where the defendant was served, it is competent for the defendant in a suit on the judgment in a State Court, to show that the service was effected out of the territorial jurisdiction of the marshal, and when he had no authority to effect service. *Ibid.*

3. One creditor holding a common law judgment, where the debtor is involved or unable to pay all his debts, cannot enjoin another creditor in a common law judgment older than the first, on the ground that the latter had received from the debtor a sufficient amount of usury to discharge his existing judgment, and, from that fact, ask a decree, either that such judgment be declared satisfied or postponed, until the senior judgment is paid. *Phillips et al. vs. Walker*..... 55
4. Where it is claimed by the junior judgment creditor of a debtor, who is unable to pay his debts, that the holder of the oldest judgment purchased another judgment younger than either of the others, for about one-fifth the amount, under an agreement that the debtor was to have the benefit of the surplus, and, by agreement between the creditors, they released their judgment liens on a certain portion of the debtor's property, which the debtor was to sell and pay a large portion of the proceeds to the creditor who held the oldest execution, and it was so sold and nearly all the portion paid to said creditor applied to the payment of the whole of the judgment so purchased by him, and on the hearing of an injunction to restrain such creditor from selling the balance of the debtor's property, under the oldest *fi. fa.*, and claiming the whole of the proceeds under it, and asking that the money so appropriated shall be credited to the oldest execution, the evidence being conflicting, and the Chancellor grants the injunction, this Court will not interfere with his discretion in so doing. *Ibid.*
5. Where land was sold under a judgment obtained against the defendant in the United States District Court, of older date than the levy of an attachment returnable to a Superior Court of this State, but the levy of the execution, based upon said judgment, was made after the levy of said attachment, and the plaintiff in attachment was present at the marshal's sale

- when the claimant purchased, and made no objections, the purchaser obtained a valid title. *Studdard vs. Lemmond* 100
6. The defendant is not concluded on the trial of a case by the action of the Court in reinstating it on the docket, from pleading and proving an alleged agreement and settlement, and that it was to be dismissed in pursuance of the alleged agreement, and that the entry of dismissal was in fact made in accordance with such contract. *Baynes vs. Billups, administrator*..... 347
7. An execution based upon a judgment against trustees which fails to specify the property to be bound for its payment, having been levied upon the trust estate, the sale will be enjoined. *Clinch et al. vs. Ferril & Weslow et al.*..... 365
8. Where suit is instituted against trustees for advances alleged to have been made to one of the *cestui que trusts*, with the assent of the defendants, for the use of the trust estate, and a general judgment is taken against the trustees, and the execution based thereon is levied upon the trust estate, the *cestui que trusts* not being parties to the execution, could not file an affidavit of illegality. *Ibid.*
9. Under section 3525 of the Code, it is necessary that the purchaser of real property should be in the possession of the same four years, before it can be discharged from the lien of a judgment against the person from whom he purchased. *Glanton et al., ex'rs, vs. Heard et al.*... 410
10. A judgment against an executor or administrator, where there is no plea, that the sum recovered "be levied of the goods and chattels, lands and tenements of the testator or intestate," is sufficient, under section 3515, Revised Code, without adding the words "in the hands of, etc., to be administered." These last words are not required by said section. *Woolfolk, adm'r and ex'r, vs. Kyle*..... 419
11. When the maker and indorser of a promissory note are dead, and the administrator of the maker is also executor of the indorser, and suit is brought on the note against him in both capacities, though the judgment does not specify the relation of maker and indorser, it is good against him, at least, so far as he is the representative of the maker, and if levy be made

accordingly, he cannot arrest it on that ground by affidavit of illegality. *Ibid.*

12. Where a Court had jurisdiction of the person and the subject matter, in the manner prescribed by law, although the proceedings may have been irregular, the judgment would not be void; *aliter*, if the Court had jurisdiction of the subject matter, but not of the person. *Johnson et al. vs. Wright et al.*..... 648

JUDICIAL SALE.

1. Where land was sold under a judgment obtained against the defendant in the United States District Court, of older date than the levy of an attachment returnable to a Superior Court of the State, but the levy of the execution, based upon said judgment, was made after the levy of said attachment, and the plaintiff in attachment was present at the marshal's sale when the claimant purchased, and made no objections, the purchaser obtained a valid title. *Studdard vs. Lemmond.*..... 100
2. This Court having held in the case of *Bailey vs. Park*, (22 Georgia Reports, 116,) that a sale of land by the sheriff under an execution for the purchase money, in favor of the vendor against the vendee, where the vendee has only a bond for titles, and the vendor has not filed and had recorded in the clerk's office a deed to his vendee for the land, before the levy is made, is illegal and void, and also reaffirmed the same principle in *Harville vs. Lowe and Smith*, 47 Georgia Reports, 214, and this case coming within that principle, and the purchaser at the sheriff's sale being charged with notice, the Court erred in dismissing complainant's bill for want of equity: Code, section 3604. *Brunson vs. Grant et al.*..... 394
3. If the purchaser at such sale be a third party, and has paid the price bid by him, and the same has been applied towards the extinguishment of the vendee's debt, he is entitled to be reimbursed out of the land to the extent of such payment of such debt. *Ibid.*

JURISDICTION.

1. The City Court of Atlanta has no power, under the Act organizing said Court, to grant new trials, nor can that power be derived from that provision in the Constitu-

- Held*, That the Court did not abuse his discretion in permitting the answer to be then filed. *McCallum & Bro. vs. Brandt* 439

GIFT.

- To make out a case of a presumptive gift of lands, under section 2622 of Irwin's Revised Code, it is necessary to show that the exclusive possession of the child, without payment of rent, shall have continued seven years during the lifetime of the father, and if he (the father) die before the seven years is complete, the presumption provided for does not exist. *McKee vs. McKee et al.* 332

GUARDIAN AND WARD.

1. Samuel C. Hitchcock having been appointed guardian of Irby Hudson, by the Ordinary of Sumter county, moved his guardianship, in terms of the law, to Hancock county. On the arrival of Hudson at the age of fourteen years, Hitchcock was, by petition, removed on the ground that Hudson was now fourteen years old, and had chosen another guardian. This was done in the county of Hancock. Soon after, A. J. S. Jackson was appointed guardian of Hudson, whose residence was then in Greene county. Jackson, the new guardian, cited Hitchcock, who resided in Fulton county, before the Ordinary of Greene county, to account. Hitchcock acknowledged service of the citation, but did not appear, and on an *ex parte* hearing the Ordinary gave a judgment against Hitchcock. An execution was issued and levied, and Hitchcock filed an affidavit of illegality on the ground that the Ordinary of Greene county had no jurisdiction to call him to account:

- Held*, That as the Ordinary of Greene county did not have the record of Hitchcock's guardianship, and as Hitchcock had never been appointed by him or been in any way subject to his jurisdiction, said Ordinary had no power to call him to account or to give a judgment against him. *Jackson vs. Hitchcock*..... 491

2. If a guardian purchase land, intending to receive a promissory note on other parties, from an administrator in whose hands is the estate in which his ward has a share, and to pay for the land with such note, the consideration of which, is the purchase money of the

appear or plead to the citation, the judgment was void, and the remedy by affidavit of illegality may be used to make the question of jurisdiction. *Ibid.*

6. Where a Court had jurisdiction of the person and the subject matter, in the manner prescribed by law, although the proceedings may have been irregular, the judgment would not be void; *aliter* if the Court had jurisdiction of the subject matter, but not of the person. *Johnson et al. vs. Wright et al.*..... 648

JURY.

1. Where a defendant is on trial for an offense for which he will be punished by death, unless the jury shall otherwise recommend, it was not error in the Court to allow a juror to be set aside by the State for cause, upon the statement that he was conscientiously opposed to capital punishment. *Johnson vs. The State.*..... 116
2. Where the juries for a term of the Court have been regularly drawn, the Court has no power to direct that they be purged unless each juror came up to the standard of uprightness and intelligence established by him, to-wit: could read the Constitution of the United States, and the Constitution of the State of Georgia, and could write. *Campbell vs. The State.*..... 353
3. Where, upon the application of this test, eight colored and two white men were found deficient and excused from further service, and the sheriff was ordered to fill up the panels with jurors from the jury list who could come up to the standard established by the Court, a challenge to the array, when the panel thus made was put upon the defendant, should have been sustained. *Ibid.*

JUSTICE OF THE PEACE.

See *Criminal Law*, 34-36.

LANDLORD AND TENANT.

1. Where a party enters upon land under a contract of purchase, the relation of landlord and tenant does not exist, and the vendee, upon failure to pay the purchase money according to his contract, cannot be dispossessed as a tenant at sufferance. *Brown vs. Persons.*..... 60

2. Whilst, as a general rule, it is true that one who goes into possession of land under a contract of purchase, cannot, at law, dispute the title of his vendor, so long as his possession is undisturbed, yet if the vendor himself parts with the title, or if it be sold under execution against him, the vendee may, in good faith, attorn to the purchaser, and in an action of ejectment by the vendor against the vendee, the vendee may, though the purchase money is still unpaid, show such sale and attornment as a defense to the action. *Beall et al. vs. Davenport et al.*..... 165
3. When the landlord failed to repair the roof of the store-house, after notice of its leaky condition, and his tenant's goods were damaged thereby, the tenant is entitled to recoup the amount of such damages as against a distress warrant for the rent. *Guthman vs. Castleberry.* 172
4. In 42 *Georgia Reports*, 226, the Court held that when a contract was made by a freedman and a landlord to make a crop, for one year, by which the landlord was to furnish the land and stock, and the freedman to work the same, and to receive one-half of the crop made thereon, such a contract did not make them partners:
Held, That this case comes within said decision. *Smith vs. Summerlin*..... 425
5. Where, in the fall of 1868, the plaintiff, by parol contract, rented to the defendants a store-house for three years, from March 1st, 1869, and defendants took possession accordingly, but one month prior to March 1st, 1871, notified the plaintiff that they would vacate the premises on that day, and the plaintiff took possession on September 1st, 1871, and sued out two distress warrants for the two quarters rent, from March 1st, 1871, to September 1st, 1871, to which the defendants filed the usual counter-affidavits:
Held, That if the statute of frauds is applicable to the case, and if the plaintiff is entitled to a specific performance of the parol contract, it was error in the Court to have so charged the jury, when the plaintiff had not alleged in his pleadings any equitable grounds which would have entitled him to that relief. *Hooper, Hough & Force vs. Dwinell*..... 442
6. The plaintiff having taken possession of the premises rented, on September 1st, 1871, before three years, un-

der the terms of the contract, had expired, he was not entitled to a specific performance of a part of the contract. *Ibid.*

LEVY AND SALE.

See *Judicial Sale*, 1, 3.

“ *Execution*, 4.

LICENSE. See *Municipal Corporation*, 2.

LIEN.

1. Under a warehouseman's receipt as follows: “Received from W. U. Garrard, one hundred and twenty-seven bales of cotton, marked, numbered, etc., as per margin, (the marks, etc., being given,) subject to this receipt only, on paying customary charges and all advances, acts of Providence and fires excepted,” the warehouseman has not only a lien on the cotton, but the consignor is liable for the customary charges that may accrue, and his liability continues until he may sell and give notice to the warehouseman, unless he be discharged by the act or consent of the warehouseman. *Garrard, ex'r, vs. Moody*..... 96
2. It is not sufficient to make a mortgage lien good against a homestead and exemption, under the Act of 1868, that it was given in lieu of another mortgage on the property, unless it further appear that the first mortgage or lien was a lien superior to the right of homestead. There is nothing in the record which shows that the original lien or mortgage was good, in spite of the homestead, either by the laws of Alabama or Georgia. *Griffin & Clay vs. Treutlen*..... 148
3. To create a lien, under the 1977th section of Irwin's Revised Code, and to have the same enforced upon the growing crops of farmers, the plaintiff must allege in his affidavit, that he is either a factor or a merchant, and that, as such, he has furnished either provisions or commercial manures, or both, upon such terms as may have been agreed upon by the parties. *Gunn et al. vs. Pattishal*..... 405
4. An execution based upon an affidavit not containing the aforesaid allegations, is void, and the plaintiff who directed the levy, and the sheriff who levied the same

upon the property of defendant, were trespassers, and liable for damages as such. *Ibid.*

5. Where land is leased for a term of years, and the lessee places improvements thereon, and, before the expiration of the lease, sells said improvements and his interest under the lease to the lessor, taking a note in part payment therefor, the lessee is not entitled to a vendor's lien upon the land for the amount of the note. *Mitchell vs. Printup*..... 455
6. A mechanic's lien on personalty was foreclosed under the provisions of the Code applicable to steamboat liens:
Held, That it was error in the Court to allow third persons to move to quash the execution, without its having been made to appear to the Court judicially, by affidavit or otherwise, that such persons were creditors of the defendant. The foundation of their right to contest the execution must be laid by an affidavit, as the Code requires, of the grounds of their denial of the validity of the plaintiff's execution. *Columbus Iron Works Company vs. Goetchius et al.*..... 576
7. Under section 3027 of Irwin's Revised Code, authorizing parties having equitable causes of action to institute proceedings for their recovery on the law side of the Superior Court, it is not competent for a plaintiff in execution on the trial of an issue, made upon an affidavit of a "claimant" of a tract of land levied on by the *fi. fa.*, to enlarge and change the issue by alleging that, though the land is not subject to the execution, yet it was bought by the claimant from the defendant, with full notice that the purchase money for the same was still due to the plaintiff, and that the land is therefore subject to the vendor's lien for the purchase money, which is the debt on which the judgment levied is founded. The amendment is not sufficiently germane to the issue formed under our claim laws to justify it. *Cox vs. Wadsworth*... 619

LIMITATIONS—STATUTE OF.

1. If an action upon the case, against a common carrier for negligence under his contract, be brought within four years, and, after four years have elapsed, the plaintiff amend his writ by adding a count in trover,

- and a count for trespass *vi et armis*: Query—whether the new counts are barred? *Southern Express Company vs. Palmer & Co*..... 85
2. Where land was held in trust to A for life, and at her death, to her children, and the trustee sold and made a deed, as trustee, to the whole estate, A, the life tenant, entering on the deed a written consent to the making of the deed:
- Held*, That this sale by the trustee and consent by the life tenant was not such an act by the tenant for life as, at common law, amounted to a forfeiture, and it was error in the Court to hold that, on the making of such a deed, a right of action, based on the forfeiture, accrued to the remainderman, and that the statute of limitations commenced to run. *Bazemore vs. Davis*... 339
3. Where a writ of *certiorari* has been granted, and the Court dismisses the same on the ground of non-compliance by the petitioner with some requisition of the statute, and plaintiff in *certiorari* makes application within three months from said dismissal for another writ, he is not barred by lapse of time, from having his second application heard: 32 Ga. R., 487. *Grimes vs. Jones*..... 362
4. A warrant for forcible entry only, which shows upon its face that the entry was more than three years before the issuing of the warrant, and which contains no allegation or charge of forcible detainer, is demurrable as insufficient in law, and should be dismissed on motion, since the statute, in terms, provides that in no case shall the person in possession be turned out, if he has been three years in peaceable possession of the premises. *DeLagal vs. Wallace, adm'r*..... 408
5. Under section 3525 of the Code, it is necessary that the purchaser of real property should be in the possession of the same four years, before it can be discharged from the lien of a judgment against the person from whom he purchased. *Glanton et al., ex'rs, vs. Heard et al*..... 410
- See *Prescription*, 1-3.

MECHANIC'S LIEN. See *Lien*, 6.

MINORS. See *Prescription*, 1. *Trusts*, 5.

MISTAKE. See *Deed*, 1-4.

MONOMANIA. See *Deed*, 5, 6.

MORTGAGE.

1. It is not sufficient to make a mortgage lien good against a homestead and exemption, under the Act of 1868, that it was given in lieu of another mortgage on the property, unless it further appear that the first mortgage or lien was a lien superior to the right of homestead. There is nothing in the record which shows that the original lien or mortgage was good, in spite of the homestead, either by the laws of Alabama or Georgia. *Griffin & Clay vs. Treutlen* 148
2. A gave B an obligation to pay a certain amount of money, and also to assume and discharge the debts owed by B, and by B and A, as contained in a schedule therein referred to, and at the same time executed to B a mortgage to secure him for said certain sum, and also for the payment of said debts, reciting in the mortgage the fact that said obligation was given, and its substance:
Held, That the lien of said mortgage is good to indemnify B for whatever amount of said debts he may have to pay. *Smith vs. Hamilton et al.*..... 467
3. The wife of A, who sets up a purchase of the mortgaged property from her husband after the execution of the mortgage, and with notice of it, cannot enjoin B from enforcing his rights under the mortgage, on the ground that said debts were not included in the mortgage, or that she had no notice of their amount. *Ibid.*

MULTIPLICITY OF SUITS. See *Equity*, 12.

MUNICIPAL CORPORATION.

1. Where the authorities of a town destroy a house to prevent the spread of a fire, and in so doing cause the destruction of personal effects in said house, which would not otherwise have been destroyed, the town is liable to the owner of the goods for the damages, even though the owner of the goods is only a tenant in the house. The verdict in this case is not illegal as con-

- trary to the testimony. *President and Council of Dawson vs. Kuttner*..... 133
2. A municipal corporation which has, without authority of law, levied and collected a license fee for retailing spirituous liquors, is liable to an action by the party paying the same for the recovery of the amount of the fee thus paid. *Callaway vs. Mayor and Aldermen of Milledgeville; Toll & Doerflinger vs. Mayor and Aldermen of Milledgeville*..... 309

NEW TRIAL.

1. In this case the jury were clearly authorized to believe that the defendant entered the house through a window, into a room where a girl of thirteen or fourteen years of age was sleeping, and got into her bed and under the cover, whilst she was asleep, and aroused her by touching her person, and that his purpose was to have sexual intercourse with her, and they having found, under a legal charge by the Court, that from his reckless and daring conduct, his intent was to use violence in the accomplishment of his purpose, this Court will not say the Court below erred in refusing a new trial on the ground that the verdict was contrary to the law or the evidence. *Sharpe vs. The State*..... 16
2. Where the ground upon which a motion for a new trial was based, was that the defendant was absent from the Court on the day the case was called and tried, because somebody had told him that the presiding Judge had given public notice to all parties in cases that were litigated, that they need not attend Court on that day, it must be made affirmatively to appear from whom the defendant obtained such information, and that such public notice was in fact given. *Massey, trustee, vs. Allen* 21
3. Where, under the aforesaid facts, the defendant sought to set aside the verdict, the statement that it was "for largely more than was justly due," was entirely too indefinite. *Ibid.*
4. The Court having to pass upon the weight and credit of the affidavits filed on the motion for a new trial, this Court will not interfere with its discretion unless abused. *Ibid.*

5. The newly discovered evidence was not shown to be, in fact, in existence, by the affidavit of the witness by whom it could be proved, or any excuse given for its non-production. *Farrow vs. The State*..... 30
6. The City Court of Atlanta has no power, under the Act organizing said Court, to grant new trials, nor can that power be derived from that provision in the Constitution allowing writs of error from the judgment of the City Court. *Tate vs. The State*..... 37
7. In view of the whole case, we cannot say that the verdict is not sustained by the evidence, and the law as to manslaughter having been fully and fairly given in charge, this Court will not interfere with the judgment of the Court below refusing a new trial. *O'Neil vs. The State* 66
8. Where there has been a jury trial and a verdict, and the evidence is conflicting, it is for the jury to determine upon the credit to be given to the witnesses, and if the Judge below, in the exercise of his legal discretion, refuses a new trial, there is no legal ground for the interference of this Court to grant a new trial. *Bussy vs. Moses* 12
9. Newly discovered evidence which would not probably have produced a different result is no ground of new trial. *Jones vs. The State*..... 163
10. When there was a trial before a jury, on a warrant for forcible entry and detainer, and the entry and force by the defendant were admitted, but it was set up that the plaintiff was holding as the tenant of the defendant, and there was evidence upon both sides upon the point, in the main by the parties themselves as witnesses, and the jury found for the plaintiff, under a charge of the Court telling them that the case turned upon the nature of the plaintiff's holding, whether in his own right or as tenant, and the jury found for the plaintiff, this Court will not overrule the Court below in refusing to order a new trial unless the verdict be most manifestly contrary to the evidence. *Monroe et al. vs. Carter* 174
11. Where several grounds are taken in a motion for a new trial, and the Court grants the motion, without stating on what ground, if there be any one of the grounds on which, if the Court had rested its judg-

- ment, this Court would not interfere, the order granting the new trial will be allowed to stand. *Reid vs. Whitfield et al.*..... 187
12. Where the plea of payment is filed, and the evidence is conflicting whether a check given by one of the defendants was accepted in payment of the debt sued on, and the Court grants a new trial on the ground, amongst others, that the verdict is against the weight of the evidence, this Court will not interfere with the discretion of the Judge so granting the new trial, unless the evidence be so strongly in favor of the verdict as to show an abuse of that discretion. *Ibid.*
13. The verdict of a jury being the decision of a tribunal appointed by law to pass upon facts, and being not contrary to, but rather supported by the evidence taken altogether, ought not to be disturbed. *Lemon, ex'r, et al. vs. Jenkins et al.*..... 313
14. There not being sufficient evidence to support the verdict, a new trial should have been granted. *Johnson vs. The State*..... 326
15. Material error having been committed by the Court, a new trial will only be refused where the evidence demanded the verdict which was rendered *Bazemore vs. Davis*..... 339
16. The weight of the evidence being in support of the verdict, and no error of law having been committed, it was error in the Court to order a new trial. *Farrar vs. Burt*..... 413
17. There being sufficient evidence to authorize the verdict in this case, and the Court below refusing a new trial, this Court will not interfere on that ground. *Smith vs. Summerlin*..... 425
18. This Court will not reverse the judgment of the Judge of the Superior Court refusing a new trial, simply because, from the evidence, there may arise in a fair mind a reasonable doubt of the prisoner's guilt. *Jones vs. The State*..... 458
19. To authorize a new trial on this ground, the failure in the testimony to establish guilt must be so complete as to make doubt and uncertainty inevitable. If a fair mind may, under the testimony, be satisfied beyond a reasonable doubt, the verdict is not illegal. *Ibid.*

20. If there be positive evidence to support the verdict, though conflicting with other evidence, and the Judge who tries the case, refuses to set it aside on the ground that it is against the weight of the evidence, this Court, as it has often decided, will not interfere, unless the verdict is so decidedly against the weight of the evidence as to be evidently the result of prejudice, or other wrong or illegal influence or motive. *Hewitt vs. Brummel*..... 481
21. Upon the trial of a case it is improper for the Court to remark as follows: "He was obliged to admit the evidence because it did bear, though very remotely, on the issue to be tried. He wished he could exclude it, but he could not. The course of the counsel, however, would not be likely to avail him much before the jury." But if the evidence, independent of that to which the remarks of the Court applied, requires the verdict rendered, a new trial will not be ordered. *Young vs. Moody*..... 498
22. The presiding Judge may exercise a sound discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against the weight of evidence, although there may appear to be some slight evidence in favor of the finding. *Ibid.*
23. The jury having, by their verdict, found that the defendant did commit the offense charged against him, and there being strong evidence to support the verdict, a new trial cannot be granted on the ground that the verdict is contrary to the evidence or the law. *Bethune vs. The State*..... 505
24. A decision awarding a new trial will not be interfered with, unless the discretion of the Court below has been abused. *Cunningham vs. Franklin, Read & Co.* 531
25. A motion for new trial was overruled, and the decision affirmed by the Supreme Court; the defendant then moved to set aside the judgment on the ground that it was rendered by a Court having no jurisdiction of the case; this ground was one of the points made upon motion for a new trial; the motion was overruled, and defendant excepted. The Court committed no error in refusing to certify the bill of exceptions. *Tate vs. Cowart, Judge*..... 540
26. Where a motion was made for a new trial on the ground that no jurisdiction was shown on the face o

- the indictment, this Court will treat that ground as a motion in arrest of judgment. *Ibid.*
27. Where a case is fairly submitted to the jury, and there is positive evidence to support the verdict, and the Judge trying the case refuses a new trial, this Court will not interfere, unless the verdict be so decidedly against the weight of the evidence as to suggest that the finding was the result of improper or illegal influences or motives. *Markham et al. vs. Hazen & Sons..* 570
28. Two verdicts having been rendered for the plaintiff, and there being evidence on which this verdict could have been found, we will not interfere with the refusal of the Court below to grant a new trial. *Willingham et al. vs. Smith.....* 580
29. Where the evidence leaves it in some doubt whether a fact necessary to sustain the verdict was established, the Supreme Court will not control the discretion of the Superior Court in awarding a new trial. *Cogan vs. Christie et al.....* 585
30. Where the evidence is conflicting, and illegal testimony be admitted which might, and probably did, injure the party objecting, a new trial will be granted. *McElrath vs. Haley et al.....* 641

NOTICE.

1. Where an action was brought by A for the use of B, against C, and it appeared on the face of the declaration that the suit was brought for the use of B, and C acknowledged service and waived a copy of the declaration before the writ was filed:
Held, That the acknowledgment of services and waiver of copy so charges C with notice of the equitable rights of B, that he cannot afterwards, before the writ is actually filed, buy up a debt against A and plead it as an offset, unless he, in some way, affirmatively make it appear that when he did so acknowledge service, he did not know the suit was for the use of B. A mere general statement that when he bought the offset he did not know of the transfer to B, is insufficient. *Whitaker, for use, etc., vs. Pope.....* 13
2. If C was in possession of land at the time S purchased it, that fact was at least constructive notice to the purchaser, and was sufficient to have put him upon in-

quiry as to the character and extent of C's claim. *Cogan vs. Christie et al.*..... 585

OFFICERS.

1. Section 918, Revised Code, authorizing the Governor to vacate the commission of defaulting tax collectors, is not "inconsistent with" Article IX. of the Constitution, which provides that county officers "shall be removable, on conviction, for malpractice in office, or on the address of two-thirds of the Senate," so as to be annulled by said Article, or by section 3, Article XI., of the Constitution. *The State ex rel. vs. Frazier.* 137
2. Article II., section 4, of the Constitution, provides, "that no holder of any public moneys shall be eligible," etc., and section 120, Revised Code, makes the failure or refusal by all holders or receivers of public money of the State to account for or pay over the same, after reasonable opportunity, "a sufficient reason for vacating any office held by such person." Section 918 of the Code provides, that the Governor may so vacate a commission in case of a defaulting tax collector. *Ibid.*

ORDINANCE OF 1865.

This being a Confederate contract, it was the province of the jury to adjust the equities between the parties under the evidence in the case, which being fairly done under the law applicable to such contracts, this Court will not interfere. *Kile vs. Johnson*..... 189

ORDINARY. .

1. Under the Act of December 5th, 1805, granting to the Inferior Courts of the several counties of this State, jurisdiction to authorize the establishment of bridges and ferries, etc., it was not within the powers of the Inferior Court of Floyd county to grant to any person the exclusive right to build and establish bridges upon the Coosa and Etowah rivers for three miles from the junction of said rivers in said county, nor had the said Court or its successor, the Ordinary, under any law passed since 1805, any such authority, and the order of the Inferior Court granting the exclusive privilege contended for, is without authority and void. *Wright et al. vs. Nagle et al.*..... 367

2. Samuel C. Hitchcock having been appointed guardian of Irby Hudson, by the Ordinary of Sumter county, moved his guardianship in terms of the law to Hancock county. On the arrival of Hudson at the age of fourteen years, Hitchcock was, by petition, removed on the ground that Hudson was now fourteen years old, and had chosen another guardian. This was done in the county of Hancock. Soon after, A. J. S. Jackson was appointed guardian of Hudson, whose residence was then in Greene county. Jackson, the new guardian, cited Hitchcock, who resided in Fulton county, before the Ordinary of Greene county, to account. Hitchcock acknowledged service of the citation, but did not appear, and on an *ex parte* hearing, the Ordinary gave a judgment against Hitchcock. An execution was issued and levied, and Hitchcock filed an affidavit of illegality on the ground that the Ordinary of Greene county had no jurisdiction to call him to account:

Held, That as the Ordinary of Greene county did not have the record of Hitchcock's guardianship, and as Hitchcock had never been appointed by him or been in any way subject to his jurisdiction, said Ordinary had no power to call him to account or to give a judgment against him. *Jackson vs. Hitchcock*..... 491

PARTNERSHIP.

1. In 42 Georgia Reports, 226, the Court held that when a contract was made by a freedman and a landlord to make a crop for one year, by which the landlord was to furnish the land and the stock, and the freedman to work the same, and to receive one-half of the crop made thereon, such a contract did not make them partners:

Held, That this case comes within said decision. *Smith vs. Summerlin*..... 425

2. Where A. sues H. as bailee for money deposited with him for safe-keeping, and H., who was a partner in business with B., the husband of A., sets up that the money was put into the partnership by B., it was not error in the Court to decline to charge, at the request of H., that if the claim of A. be true, yet if B. put the money into the concern of H. and B., the suit should have been brought against B., or against H. and B.

The non-joinder of B. should have been pleaded in abatement, in order for H. to avail himself of it. And H. was not entitled to the charge as to the suit being brought against B. individually, unless it had contained the qualification that H. did not know the money belonged to A., when it was so put into the concern of H. and B. *Hewitt vs. Brummel*..... .. 481

3. The maker of a promissory note, payable to a partnership, at sixty days, cannot set up a defense against the note that it was agreed between him and two of the partners, when the goods were bought and the note given, that it should be settled at a future time by being credited on an account held by the maker on one of those two partners, the other partner not being a party to such agreement. *Harper vs. Wrigley & Knott*. 495
4. If a draft be drawn on an individual, and the drawee, before its acceptance, form a partnership with others, and the partners agree to use in the business of the partnership the goods, for the payment of which the draft was drawn, and to pay for them, and they do so use them, and the partner who is the drawee accept the draft for the partnership, the acceptance is binding on the partners. *Markham et al. vs. Hazen & Sons*..... 570
5. Where the name of the partnership is the "Republican Association," and whose sole business was the publishing of a newspaper, called "The Opinion," and the acceptance is "accepted May 24th, 1867, for the Opinion newspaper," (signed) "W. L. S.," and W. L. S. is one of the partners, it is a sufficient identification of the partnership to bind the partners. *Ibid*.
6. When A, holding a written obligation made by a partnership composed of three persons, received from one of them nearly one-half of the amount due, and gave to him a written receipt for the money, "to be credited on a certain written obligation" made by the firm "now in the hands of Hillyer & Brother for collection, and in consideration of said sum I do hereby consent and agree that the other partners shall and will duly pay the balance due on said obligation without further cost or detriment to the said Thrasher." Afterwards, the other parties failing to pay, A commenced suit on the obligation against the firm, and the firm pleaded the receipt and the covenant therein contained as a release

from the debt, inuring by operation of law to the whole firm:

Held, That the latter clause of section 2810 of the Revised Code providing that "a bond to indemnify the debtor against his own debt, is equivalent to a release" does not apply to this receipt and agreement. This is not the debt of the person taking the receipt alone, but a debt on which he is jointly liable with others, and whilst a release to him would be a release of all, yet a covenant to *indemnify* him, may well consist with the continuance of the debt as an existing obligation against all, which was, upon the face of the paper, the clear intent of this receipt; besides, the other partners were not parties to this covenant, and could not sue on it, nor was this Thrasher's own debt. *Kendrick vs. O'Neil, Foster & Co*..... 631

PARTY.

1. When the Governor of this State, with other creditors of the Brunswick and Albany Railroad Company, filed a creditor's bill against the company, alleging that the company was insolvent, and praying the appointment of a receiver, the bill charging that the State of Georgia was interested in the assets, in so far that it was stated that certain bonds of the company were in circulation, purporting to have upon them the State's indorsement, and praying on the part of the State that the receiver might be appointed and the property preserved until the liability of the State should be ascertained:

Held, That the Legislature having, by law, declared that the indorsement of the bonds was illegal and void, it was not error in the Chancellor, on motion of the Governor, to dismiss the State as a party plaintiff to the bill, even if the receiver had been appointed and had possession of the effects of the company, under the order of the Court. *Brunswick and Albany Railroad Company vs. The State*..... 415

2. A Judge of the Superior Court in this State did not have the power, either in term or at Chambers, under the Act of 20th February, 1854, or under the provisions of any statute, or of the common law, to grant authority to a trustee to sell and convey land held by said trustee for an infant *cestui que trust*, unless such

infant was made a party to the proceedings instituted for that purpose by a representative properly appointed.

Hill et al. vs. Printup..... 452

3. Where A. sues H. as bailee, for money deposited with him for safe-keeping, and H., who was a partner in business with B., the husband of A., sets up that the money was put into the partnership by B., it was not error in the Court to decline to charge, at the request of H., that if the claim of A. be true, yet if B. put the money into the concern of H. and B., the suit should have been brought against B., or against H. and B. The non-joinder of B. should have been pleaded in abatement, in order for H. to avail himself of it. And H. was not entitled to the charge as to the suit being brought against B. individually, unless it had contained the qualification that H. did not know the money belonged to A., when it was so put into the concern of H. and B. *Hewitt vs. Brummel*..... 481

4. A mechanic's lien on personalty was foreclosed under the provisions of the Code applicable to steamboat liens :

Held, That it was error in the Court to allow third persons to move to quash the execution, without its having been made to appear to the Court judicially, by affidavit or otherwise, that such persons were creditors of the defendant. The foundation of their right to contest the execution must be laid by an affidavit, as the Code requires, of the grounds of their denial of the validity of the plaintiff's execution. *Columbus Iron Works Company vs. Goetchius et al*..... 576

PLEADING.

1. An action against a common carrier for negligence in the performance of his duty as a carrier, under a contract to carry, is an action upon the case *ex delicto*, and may be joined with a count in trover or trespass *vi et armis*, but if the action be for negligence alone, under the contract to carry, or if the counts in trover or trespass *vi et armis*, be abandoned, the plaintiff cannot repudiate the contract, either expressed or implied, under which the carrier received the goods, and recover for an unlawful taking. *Southern Express Company vs. Palmer & Co*..... 85

2. A carrier who receives goods to carry from one not authorized to deliver them to him, is a trespasser, and may be sued in trover for the goods, as any other illegal taker may be; but if a suit be brought against him as a carrier, charging him with having taken the goods under a contract with the plaintiff's agent, and with neglect of duty under the obligations of that contract, and there be no count for a wrongful taking or conversion, the plaintiff can only recover for a breach of duty, under the contract, as made with his agent. *Ibid.*
3. The contract in the record between the Adams Express Company and the Southern Express Company is an express contract, signed by both parties, in which it is specifically agreed that the Southern Express Company should not be liable for "river risks" on any goods delivered to it for carriage by the Adams Express Company, and if the owner of the goods sue the Southern Express Company, not as a tortious taker, but as a carrier under that contract, for negligence, by which the goods were lost, he must abide by its terms. *Aliter*, if he sue in trover or in trespass for an illegal taking or conversion. *Ibid.*
- 4 The case of the *The Southern Express Company vs. Shea*, 38 *Georgia Reports*, 519, and the case of the *Southern Express Company vs. Cohen & Menko*, 45 *Georgia Reports*, 148, are, as to the facts and the pleadings, similar to the present case, and must control it. *Ibid.*
5. If an action upon the case, against a common carrier for negligence under his contract, be brought within four years, and, after four years have elapsed, the plaintiff amend his writ by adding a count in trover, and a count for trespass *vi et armis*: *Query*—whether the new counts are barred? *Ibid.*
6. When plaintiffs sue in their representative capacity, on a note due to their testator or intestate, and there is no plea in abatement filed at the first term of the Court, the plaintiffs are not required at the trial term to prove that they have been legally appointed executors or administrators. *Aliter*, if their letters testamentary or of administration constituted a part of their title to the property sued for. *Hazelhurst vs. Morrison*..... 397
7. Where A. sues H. as bailee, for money deposited with him for safe-keeping, and H., who was a partner in

business with B., the husband of A., sets up that the money was put into the partnership by B., it was not error in the Court to decline to charge, at the request of H., that if the claim of A. be true, yet if B. put the money into the concern of H. and B., the suit should have been brought against B., or against H. and B. The non-joinder of B. should have been pleaded in abatement, in order for H. to avail himself of it. And H. was not entitled to the charge as to the suit being brought against B. individually, unless it had contained the qualification that H. did not know the money belonged to A., when it was so put into the concern of H. and B. *Hewitt vs. Brummel*..... 481

8. Although a plea of usury does not "set forth the sum upon which it was paid, or to be paid, the time when the contract was made, where payable, and the amount of usury agreed upon," etc., as required by 3410th section of the Code, yet if it does state the rate per cent. of interest which was agreed to be paid, and that the usury in the contract sued on amounts to as much as is due on the contract, and no demurrer or exception is taken to the plea, it is error in the Court to charge the jury that because the plea does not set forth the foregoing specifications they cannot consider it. *Siesel & Bro. vs. Harris*..... 652

POSSESSION—BADGE OF FRAUD.

See *Vendor and Purchaser*, 5.

POSSESSION AS NOTICE. See *Notice*, 2.

POSSESSORY WARRANT.

1. In this case, which was a bill of exceptions to the judgment of Judge Johnson, refusing to sustain a *certiorari* in a possessory warrant case, it appeared that the warrant was for three bales of cotton; that the cotton was made on the plantation of Mrs. McLemore, the plaintiff, by one Joiner and herself, who had farmed together in the making thereof; that Joiner had, during the summer, given to the plaintiff a lien upon all his interest, for advances, etc., with a power to sell; that, later in the year, he had, in writing, sold and transferred to her his whole interest in the crop; that, whilst the cotton was on the farm, it was levied on as the property

of Joiner and carried to a warehouse; that Mrs. McLemore put in a claim to it; that, on the trial of the claim, the property was found to be hers; that, two days after the finding, Joiner by consent of one of the claimant's attorneys, took the cotton from the warehouse and sold it to the plaintiff in the claim case, and delivered it to him, and that he, the said plaintiff, is now the owner, the present defendants being only his bailees. In our judgment, the cotton was legally in Mrs. McLemore's possession at the time of the levy; that, after the trial of the claim case, the custody of the warehouseman was her custody; that there is no proof of the authority of the attorney of Mrs. McLemore, two days after the trial and verdict, to consent for Joiner to take the cotton, and we, therefore, affirm the judgment refusing to order a new trial before the magistrate, or to restore the cotton to the defendants in the possessory warrant. *Murphy & Co. vs. McLemore*.....

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2. A possessory warrant, which states that certain cotton having been lately in the peaceable and legally acquired possession of A B, has been illegally taken out of his possession by some person unknown and placed on the cars of the Griffin and North Alabama Railroad Company, and directing the seizure of the property and the arrest of said unknown person when found, is not a void warrant. It is a warrant in which A B is the complainant, the railroad company the defendant, and it sufficiently charges the property to be in the possession of the railroad company without lawful warrant. The order to arrest the unknown person, and the failure to direct the arrest of the company do not make it void, if the property be, in fact, taken. *Savannah, Griffin and North Alabama Railroad Company vs. Wilcox, Gibbs & Co*.....

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PRACTICE IN SUPERIOR COURT.

1. Where the ground upon which a motion for a new trial was based, was that the defendant was absent from the Court on the day the case was called and tried, because somebody had told him that the presiding Judge had given public notice to all parties in cases that were litigated, that they need not attend Court on that day, it must be made affirmatively to appear from whom the defendant obtained such infor-

- mation, and that such public notice was in fact given. *Massey, trustee, vs. Allen* 21
2. Where, under the aforesaid facts, the defendant sought to set aside the verdict, the statement that it was "for largely more than was justly due," was entirely too indefinite. *Ibid.*
3. An award of arbitrators was, by order of the Court, entered on the minutes, during the November term, 1871. At the same term, exceptions to the award were filed. No further action was taken at that term. At the ensuing April term, a demurrer to the exceptions was heard and sustained, and an order to that effect entered on the minutes. At the time of hearing the demurrer, leave was granted to defendant and time given to amend the exceptions. On the next day, the amendment was made and sworn to in open Court, though it does not appear to have been then filed. On the 28th of June, the juries were discharged for the term, and the Court adjourned to the 26th of the ensuing August, to hear motions, etc. On that day, the plaintiff moved for judgment on said award and for execution. Defendant objected, and the Court allowed the amended exceptions to be filed, and certifies to this Court that he "regarded the application for leave to amend as being in all the time, and why the order dismissing the exceptions was entered on the minutes, he did not remember:"
- Held*, That as it does not appear that plaintiff made any further motion, or asked for a trial in the case before the discharge of the juries, and had notice of the intention of defendant to file the amended exceptions, and leave granted therefor, and the Judge, who knew all the facts, holding that the time he had granted had not expired, it was not error in the Court to allow them to be then filed. *Tumlin vs. The Virginia H. Insurance Company*..... 26
4. It is the province and duty of the Court to control the entries on its own docket, and if incorrectly made, to have the same corrected. *Baynes vs. Billups, adm'r.* 347
5. The defendant is not concluded on the trial of a case by the action of the Court in reinstating it on the docket, from pleading and proving an alleged agreement and settlement, and that it was to be dismissed in pursuance of the alleged agreement, and that the

entry of dismissal was in fact made in accordance with such contract. *Ibid.*

6. At the same term at which judgment was obtained against the principal debtor, a defaulting garnishee moved the Court, after the discharge of the jurors, to be allowed to file his answer denying any indebtedness, and for cause why the answer was not filed before, showed that the original defendant had been, before that time, in a case of involuntary proceedings in bankruptcy, adjudged a bankrupt; that a new trial had been granted, and the proceedings in bankruptcy were still pending:

Held, That the Court did not abuse his discretion in permitting the answer to be then filed. *McCallum & Bro. vs. Brandt*..... 439

7. Upon the trial of a case it is improper for the Court to remark as follows: "He was obliged to admit the evidence because it did bear, though very remotely, on the issue to be tried. He wished he could exclude it, but he could not. The course of the counsel, however, will not be likely to avail him much before the jury." But, if the evidence, independent of that to which the remarks of the Court applied, requires the verdict rendered, a new trial will not be ordered. *Young vs. Moody*..... 498

8. When a suit was pending, on an express contract, and the defendant, after filing a plea of the general issue, under oath, withdrew his plea and filed the same plea not under oath:

Held, That under the Constitution of 1868, it was the duty of the Court to render a judgment for the plaintiff, on proof of the allegations in the declaration, and it was error in the Court to permit the defendant to introduce evidence in support of his plea. *Craig vs. Pope*..... 551

9. The plaintiff may dismiss his case at any time before the verdict is published, if unknown to him. *Peeples vs. Root*..... 592

PRACTICE IN THE SUPREME COURT.

1. The introduction of the prisoner's statement is not such an introducing of testimony as deprives the prisoner of the conclusion, if he introduces no testimony, but

- we are of the opinion that the statement of the Judge, to the effect that, if it was introduced, he would, when the time for the argument came, hold the prisoner not entitled to the conclusion, was not, under the statute, a decision so as to authorize a bill of exceptions. *Farrow vs. The State*..... 30
2. The brief of evidence, when brought up as a part of the record, though the bill of exceptions, certified to by the Judge, contains the assertion that it was agreed upon by counsel, must nevertheless show that it was approved by the Court. *Massey, trustee, vs. Pitts, Cook & Co.*..... 124
3. Service of the bill of exceptions by counsel for plaintiff in error by mailing the same, addressed to the attorneys of defendants, is insufficient. *Clark vs. Lyon et al.*..... 125
4. Where service of the bill of exceptions is perfected by counsel for plaintiff in error, such service must be authenticated by an affidavit made by such attorney at the time of the service, and attached to the bill of exceptions. *Ibid.*
5. There having been no service of the bill of exceptions as required by law, the written waiver of such service after the case has been reached in the Supreme Court, cannot give said Court jurisdiction. *Meador, adm'r, vs. Dent et al.*..... 126
6. Where an injunction was refused by the Chancellor, and the case, by writ of error, was carried to the Supreme Court and the judgment reversed, and defendants then moved before the Chancellor to dissolve the injunction, which motion was overruled, such decision cannot be carried by bill of exceptions to the Supreme Court, within ten days, under the Act of October 28th, 1870. *Armstrong, adm'r, et al. vs. Lewis*..... 127
7. Where, during the progress of a cause in equity, there was a reference of accounts to a master, who reported, and his report was excepted to, on matters of fact and of law, and before any final action on the exceptions, the Judge permitted one of the parties to withdraw his account and substitute another:
Held, That this was a mere interlocutory order, and not such a judgment as can be brought to this Court before a final judgment in the cause. *Lyon, McLendon & Co. vs. Clews & Co.*..... 415

8. Whenever the bill of exceptions contains a mere recital of the grounds taken in a motion for a new trial, and the judgment of the Court below is a general judgment overruling the motion, and nothing appears in the motion, judgment or bill of exceptions verifying the grounds as true, no assignment of error can be founded on such grounds so as to entitle them to be heard in this Court; and the more especially is this so, when the pleadings in the case do not authorize the issues raised in such grounds. *Smith vs. Summerlin...* 425

9. While it may not have been altogether proper for the Court to have said to the jury, "That if they did not make haste, he should not be there to receive the verdict, as the Court-room would be occupied in a few minutes by a Democratic meeting," yet it does not require that the verdict should be set aside therefor, on the ground that the jury were unduly hastened by it in their deliberations, when the Court immediately added: "You will then seal your verdict and return it in the morning. *Hewitt vs. Brummel.....* 481

10. When exceptions were filed to an award, which were, on demurrer, held by the Court below to be insufficient, and it appeared by the record that the exceptions were on the ground of a mistake alleged to have been made by the arbitrators in charging the excepting parties with certain items, especially one of \$3,500 00, which, it was alleged, was clearly not a proper charge against them, as would appear by the evidence, which evidence was partly set forth in the exceptions and partly referred to as contained in the books of the parties who are merchants, which books, the exceptions stated, were in the presence of the Court, but being voluminous, were not attached by abstract:
Held, That the contents of the books were a necessary part of the exceptions, and the plaintiffs in error having failed to complete their record in the Court below by having such abstract in fact attached and sent here as part of the record, under the certificate of the clerk, this Court will not reverse the judgment of the Court below, it being impossible for us to say, in the absence of said abstract, whether he was right in his judgment or not. *Richmond & Co. vs. Phillips & Flanders et al.* 542

11. A motion for a new trial was overruled, and the decision affirmed by the Supreme Court; the defendant

then moved to set aside the judgment upon the ground that it was rendered by a Court having no jurisdiction of the case; this ground was one of the points made upon the motion for a new trial; the motion was overruled, and defendant excepted. The Court committed no error in refusing to certify the bill of exceptions.

Tate vs. Cowart, Judge 541

12. Where a motion was made for a new trial on the ground that no jurisdiction was shown on the face of the indictment, this Court will treat that ground as a motion in arrest of judgment. *Ibid.*

13. Where the oral evidence is contained in the bill of exceptions, and the depositions are attached thereto as an exhibit, with a reference therein contained making them a part thereof, all of which is followed by the usual certificate of the Judge, the writ of error will not be dismissed. *Atlanta & R. A. L. Railroad Company vs. Wood*..... 565

14. The cases on the docket having been continued for providential cause at the first and second terms thereof, and William Dougherty having died during the second term of the Court, the motion to dismiss all the cases for want of jurisdiction to hear them, should be overruled. *Dougherty vs. Fogle; Dougherty, assignee, vs. Barber et al*.....615

15. The motion to dismiss the case of William Dougherty, assignee, vs. James Barber *et al.*, on the special grounds stated in the motion, cannot be entertained now, inasmuch as the plaintiff has no legal representative before the Court, but the defendants may suggest the death of the plaintiff on the record, and take such further proceedings in the case as are authorized by the 26th Rule of this Court. *Ibid.*

16. Where, in view of the previous rulings of the Supreme Court, it appears that a case was brought up merely for delay, damages will be awarded. *Eagle Manufacturing Company et al. vs. Wise*..... 630

17. Where plaintiff in error seeks to withdraw the writ of error, the record will be opened, on motion of defendant in error, for the purpose of hearing his claim for damages. *Ibid.*

PREScription.

1. Does the voluntary purchase of a tract of land by a minor, after the statute of limitations has commenced to run, take the case out of the general rule, that no prescription works against the rights of a minor during infancy? Query? *Lamar et al. vs. Turner et al.*..... 329
 2. To make out a case of a presumptive gift of lands, under section 2622 of Irwin's Revised Code, it is necessary to show that the exclusive possession of the child, without payment of rent, shall have continued seven years during the lifetime of the father, and if he (the father) die before the seven years is complete, the presumption provided for does not exist. *McKee vs. McKee et al* 332
 3. Where land was held in trust for A for life, and at her death, to her children, and the trustee sold and made a deed, as trustee, to the whole estate, A, the life tenant, entering on the deed a written consent to the making of the deed:
Held, That this sale by the trustee and consent by the life tenant was not such an act by the tenant for life as, at common law, amounted to a forfeiture, and it was error in the Court to hold that, on the making of such a deed, a right of action, based on the forfeiture, accrued to the remainderman, and that the statute of limitations commenced to run. *Bazemore vs. Davis*... 339
- See *Limitations, Statute of*, 1-5.

PRESUMPTION.

1. To make out a case of a presumptive gift of lands, under section 2622 of Irwin's Revised Code, it is necessary to show that the exclusive possession of the child, without payment of rent, shall have continued seven years during the lifetime of the father, and if he (the father) die before the seven years is complete, the presumption provided for does not exist. *McKee vs. McKee et al.*..... 332
2. The "distribution" of an estate is *prima facie* presumed to have been by the methods pointed out by law, and that a return thereof has been made to the Ordinary, and parol evidence of the terms of the distribution is not admissible, unless it appear that there was

no return, or some excuse shown why it was not presented. *Ibid.*

3. The law does not presume malice against a judicial officer because he renders an illegal judgment, or because, in the discharge of his official functions, he does an illegal act. *Campbell vs. The State*..... 353
 4. When goods delivered to a common carrier for transportation were seized by legal process and taken out of his possession by the sheriff, and the carrier forthwith gave notice to the consignor and consignee, and they made no reply and took no further notice of the proceedings:
Held, That the carrier had a right to presume they had abandoned the property, as subject to the legal process which had seized it. *Savannah, G. & N. A. R. R. Co. vs. Wilcox, Gibbs & Co.*... 432
 5. Goods are *prima facie* presumed to have been received by a carrier in good order for shipment, and if they were not so, it is for the carrier to show it. *Breed, lessee, vs. Mitchell*..... 533
- See *Railroads*, 8, 17.

PRINCIPAL AND AGENT.

1. If one adopt a contract made with his agent, who had no authority to make such a contract, he must adopt it entirely; he cannot adopt a part and repudiate a part. *Southern Express Co. vs. Palmer & Co.*..... 85
2. The purchaser of cotton, who stores the same with a warehouseman, is liable for the storage, notwithstanding he is the agent of a third party in making the purchase, unless he disclose the fact of his agency, and his principal, to the warehouseman. *Garrard, ex'r, vs. Moody* 96
3. If, after such storage, the bailee ascertained the agency, and elected to go on the principal for his claim for storage he would be bound by such election; and when the Court charged this principle, and further charged, that, "To make inquiries as to whether the principal be liable, to request that his accounts be forwarded to the principal to ascertain if he will pay them, will not be an election, there must be an intent to look to an ascertained principal alone for payment to constitute an election," it was not error—the more especially when

the whole charge is looked to in connection with the evidence on this point in this case. *Ibid.*

4. When the Court fully and distinctly leaves the questions as to the agency and election to the jury, it was not error—at least not such error as to authorize a new trial, for the Court to have refused to allow a witness to testify: “That after the presentation of the account to A. B. (the alleged principal) by the attorney of defendant, which fact was known to the executor of the purchaser of the cotton, the executor paid to A. B. about \$8,000 00 due by the testator to A. B. on a guaranty.” *Ibid.*
5. Such evidence may exhibit the equity of the principle why an election should discharge the agent, but it would not tend to establish the point in issue, as against the creditor, to-wit: Had he made an election? *Ibid.*
6. Where an agent and overseer sues his employer on an open account, for his services rendered as such, it is competent for the defendant to prove and recoup the damages sustained by him in consequence of the failure of the plaintiff to enforce the provisions of the contract made by him as the agent of the defendant, with the freedmen. *Lee vs. Clements*..... 128
7. When money, goods or supplies are furnished by the owner of a plantation to his agent and manager thereof, to be advanced to the freedmen in his employ, to be paid for at the end of the year out of their share of the crop, and the same has been received by such agent or manager, the burden of proof to show that he has made a proper application of such money, goods and supplies for the benefit of the owner, is upon him, but the more especially is it so when the agent and manager is specially instructed to keep a regular account of his receipts and disbursements, as in this case, otherwise the owner of the plantation cannot make a fair and just settlement with his laborers at the end of the year. *Ibid.*
8. If the plaintiff failed and neglected, as the agent and manager of the defendant, to keep a regular account of his receipts and disbursements, when he was specially requested to do so, and in consequence thereof, the defendant has been damaged by such negligence, then he is entitled to recoup such damages, and have the same

deducted from the plaintiff's claim for his services as such agent and manager. *Ibid.*

9. Where M. had cotton stored at a warehouse, and sold forty-three bales to Y. for himself, and fifty-six bales to him as the agent of E., and one hundred and seven bales to him as the agent of W., and the bills for the cotton being made to Y., because he told M. that he would pay the storage, and the question on trial was whether Y. was responsible for the storage of any more of the cotton than the forty-three bales purchased for himself:

Held, That this depends upon the fact whether the credit was given to Y. for the storage of the entire lot, or whether any part of it was stored on the credit of E. or W. *Young vs. Moody*..... 448

10. If the supervisor of a railroad, who has authority to purchase cross-ties for his principal, contracts with a party for their purchase, stating to the seller that his principal wants them to lend to another railroad to which it had promised them, and the cross-ties are furnished and put on the cars of the road whose agent has thus contracted for them, such road is liable for their payment, notwithstanding the statement as to the purpose for which they were purchased be not true, and the real fact was that the supervisor was the agent of another party in making the purchase. The seller is not affected by the truth or falsehood of the statement. *Southwestern R. R. Co. vs. Knott & Co*..... 516

PRINCIPAL AND SECURITY.

1. Where a proposition is made by the principal debtor in the judgment to pay less than one-half in satisfaction thereof, to which the plaintiff assented, provided the payment should be made within thirty days, this, without more, did not injure the surety or increase his risk, or expose him to greater liability, by which he would be discharged. *Sullivan vs. Hugely*..... 486
2. Where, pending an action on a sheriff's bond, the sheriff and one of the securities die, the plaintiff may proceed against the surviving securities. *Bullock, Gov'r, vs. King et al*..... 550

PROMISSORY NOTES.

1. A promissory note was given, payable at twelve months. The note was transferred by the payee, and a few days after its maturity, the transferee or bearer indorsed the note to plaintiff. It does not distinctly appear from the evidence whether the first transfer was made before or after the maturity of the note. The defense against the note was that the payee procured it by duress or threats amounting to fraud. The Court charged the jury, that if the note was procured by duress (stating what constitutes duress,) and the plaintiff came into possession of the note after it fell due, they would find for the defendant:
Held, That this charge of the Court was error, inasmuch as it assumes that the first transfer of the note was not made until after its maturity. If the first transferee came into the possession of the note before it was due, and the law presumes he did, unless the contrary was proven, then, under the decision in *Robinson vs. Vason et al.*, 37 Georgia, 66, the defenses could not be set up against him, and his indorsee holds the note free from all the equities against which it was protected in his hands. *Hogan vs. Moore et al.* 156
2. When the maker and indorser of a promissory note are dead, and the administrator of the maker is also executor of the indorser, and suit is brought on the note against him in both capacities, though the judgment does not specify the relation of maker and indorser, it is good against him, at least, so far as he is the representative of the maker, and if levy be made accordingly, he cannot arrest it on that ground by affidavit of illegality. *Woolfolk, adm'r and ex'r, vs. Kyle* 419
3. When a suit was pending on a promissory note dated January 1st, 1860, for \$240 00, due one day after date, made by C. McCalla, with a memorandum on the back thereof as follows: "The within note to be paid when C. McCalla collects a certain note on Thomas Pledger for \$251 00." And it was in proof, by a witness, who was present when the note was made, that it, "the note, was given for a note the payee had on Pledger, which C. McCalla was to collect; when collected, he was to pay the note sued on. The payee was to pay C. McCalla for his services. The memorandum was made at the same time as the note:"

- Held*, That these facts were proper to be considered by the jury in determining what the parties meant by the note and memorandum, and that it was error in the Court to charge the jury that they could only consider it as it tended to show fraud or want of consideration. *McCalla vs. McCalla*..... 503
4. If the facts show that it was the intent of the parties, by this note and memorandum, simply to make C. McCalla an agent to collect the Pledger note, then his liability would depend on whether he did collect it, and if not, whether he failed to use that diligence which it is the duty of a paid agent to use. *Ibid.*

RAILROADS.

1. Where a railroad company claims title to land, as having been condemned under the provisions of its charter, the burden of proof is upon the company to show a strict compliance with its terms. *Mobley vs. Breed, lessee*..... 44
2. Upon the trial of the issue as to whether land was legally condemned under the provisions of the charter of a railroad company, it was error to allow a witness to testify that "the assessment was made in accordance with the provisions of the charter, and all the notices required to be served, were either served or waived by the parties," although the original papers may have been lost or destroyed. *Ibid.*
3. Where the owner of land, through which a proposed railroad will run, contracts to accept payment for his land in the stock of said company, upon the consolidation of said company with another, said land-owner is not compelled to accept the stock of said new company. *Ibid.*
4. When, during the late war, a company of men organized as soldiers, though unarmed, were on their way from Columbus to Atlanta, with the open intent to offer themselves to Governor Brown for service as soldiers in the Confederate army, and a railroad company received them on its cars as soldiers, with their baggage, the transportation to be paid for by the State or Confederate authorities:
- Held*, That both the company of men and the railroad company were engaged in an illegal transaction, and

- the rule *in pari delicto*, etc., applies to a suit against the railroad company for negligence in its duty as a common carrier. *Redd, ex'r, vs. Muscogee R. R. Co.* 102
5. But when it appeared by the proof that one of the soldiers having with him a negro slave, and the railroad company refused to carry the slave as a soldier, or as a part of or adjunct to the company, but demanded and received from the soldier fare for said slave as an ordinary passenger, the rule *in pari delicto* does not apply, and if the owner of the slave is injured by the negligence of the road, he can recover for the injury. *Ibid.*
6. A member of a chartered company may, by his acquiescence or presumed assent, become bound by the acts of his company, and thereby be disabled from setting them up as a defense, when he could have so set them up were it not for such presumed ratification. *May vs. Memphis B. R. R. Co.*..... 109
7. The original contract between the stockholders of a railroad company, as contained in the charter, cannot be materially or essentially altered by an amended charter, so as to bind the subscribers thereto without their consent. *Ibid.*
8. The presumption of the law is that the owner of a lot is acquainted with the condition of his own property, if a natural person, and if an artificial one, that it has such knowledge through its agents and employees. *Nelson vs. Central Railroad and Banking Company*... 152
9. An action of trespass *quare clausum fregit*, which sets forth that the defendant had, without authority of law and without consent of the plaintiff, built a railroad upon the plaintiff's land and had used and occupied it for a right of way since 1858 (more than seven years) is not demurrable, on the ground that on its face it shows the plaintiff's right to be barred by the statute of limitations. *Atlantic and Gulf Railroad Company vs. Fuller, trustee*..... 423
10. The owner of land taken by a railroad company for right of way is not debarred of his action for trespass, because the charter authorizes the company, in a particular way, to so appropriate the land, unless the company have pursued the mode pointed out, and thus acquired the legal right. *Ibid.*

11. When in a suit, against a railroad company, for killing the plaintiff's mule by the negligent running of its trains, it appeared that the mule was found dead near the track one morning, under circumstances indicating that it had been killed by the train, which had passed that way during the previous night, and it further appeared that the place where the mule was killed was in a field, into which the plaintiff had turned it with other stock to graze, and that said field was a common inclosure of the plaintiff's land and the railroad track—the plaintiff's fence on two sides, running over the right of way to the track, and with cattle-pits across the track :

Held, That under such circumstances the railroad company was not liable for killing the mule, unless there was some actual negligence of the persons managing the train, and it appearing affirmatively by the evidence, (without contradiction) that there was no negligence or want of care, and the jury having found for the plaintiff, the Judge ought to have granted a new trial. *Macon and Augusta R. R. Co. vs. Vaughn*..... 464

12. When there was a trial of a suit for damages for killing the plaintiff's cow, against a railroad company, and the declaration claimed as a part of the damages, expenses of litigation, under section 2801 of Irwin's Revised Code:

Held, That it was not error in the Court to permit the plaintiff to prove "that he offered to compromise, that they refused and offered to pay him \$30 00. He refused to take \$50 00, but was willing to settle without suit." *Selma, Rome and Dalton Railroad Company vs. Fleming*..... 514

13. In an action against a railroad company for killing a cow of the plaintiff by the running of its cars, it was not error in the Court to refuse to charge as requested: "If plaintiff's cow fell down a bank and rolled under the train after the engine passed her, or if the cow jumped on the track fifteen feet in front of the engine, then the accident was unavoidable and the company is not liable." Whether the company was negligent or not it was for the jury to find, and it was not the duty of the Court to decide whether or not, under such circumstances, there was negligence. *Ibid*.

14. If the supervisor of a railroad, who has authority to purchase cross-ties for his principal, contracts with a party for their purchase, stating to the seller that his principal wants them to lend to another railroad to which it had promised them, and the cross-ties are furnished and put on the cars of the road whose agent has thus contracted for them, such road is liable for their payment, notwithstanding the statement as to the purpose for which they were purchased be not true, and the real fact was that the supervisor was the agent of another party in making the purchase. The seller is not affected by the truth or falsehood of the statement. *Southwestern Railroad Company vs. Knott & Co.*..... 516
15. When, without authority of law, a railroad company, thirty years ago, changed the public road at one of its crossings, cut out a new road, and, at some expense, built a bridge over a stream said new road crossed; and, by common consent, the old road was abandoned and the new one used by the public:
Held, That the railroad company, in the absence of any contract so to do, is not bound to keep up said bridge, and the mere fact that the company first built it, and that it has since, at various times, repaired it, (it being near one of its depots,) does not make an implied contract with the county that the company will keep it in repair. *Brookins, Ordinary, vs. Central Railroad and Banking Company*..... 523
16. A non-resident of this State, who is the lessee of a railroad in this State, and therefore liable to be sued as was the railroad company, is none the less liable to be proceeded against by attachment as other non-residents are. *Breed, lessee, vs. Mitchell*..... 533
17. When a suit was brought against a railroad company for damages caused to the plaintiff by his falling into an excavation made by the company across the public highway, and it appeared in proof that the public highway had for years run in a particular place; that on the approach of the railroad constructors to that place, the road had been turned so as to take a different route; that within a week or ten days after the change, the plaintiff, traveling the road with his wagon and team, had taken the old route, it being in the night, and had been stopped by the cut or excavation; that he had got out of his wagon to see what was the matter, and in

passing to the front had fallen into the cut and broken his thigh, so as to cause him great pain, expense and loss of time, and so as to lessen his effectiveness as a working man one-fourth, for life, and so as to shorten his leg by three inches:

Held, That the burden of showing that the route of the road had been legally changed, was upon the defendant, and this could only be shown by production of the order, or by proof of such long established usage as to justify a presumption of such order. *Atlanta and Richmond Air Line Railroad Company vs. Wood*..... 565

18. The measure of damages in such a case is the actual injury suffered. This may include bodily and mental suffering. And when the Court added to this charge that the jury might include "the injury to his pride, his manhood:"

Held, That whilst the latter language is not strictly accurate, yet, as the proof shows that the plaintiff was permanently deformed by being lamed for life, the jury may well have understood the Court, as referring by his words to this deformity, and as the verdict is not excessive, this Court will not disturb it. *Ibid*.

RATIFICATION. See *Principal and Agent*, 1.

RECEIVER.

A receiver appointed by a Chancellor to "collect" the effects belonging to a corporation, a defendant in a suit pending in chancery, has no authority to bring a suit in order to get possession of the effects, unless he be specially authorized so to do by the order of the Chancellor, and if he bring such suit and fail to show the order, he cannot recover. *Screven, receiver, vs. Clarke*. 41

RECOUPMENT.

1. Where an agent and overseer, sues his employer on an open account for his services rendered as such, it is competent for the defendant to prove and to recoup the damages sustained by him, in consequence of the failure of the plaintiff to enforce the provisions of the contract, made by him as the agent of the defendant, with the freedmen. *Lee vs. Clements*..... 128

2. If the plaintiff failed and neglected, as the agent and manager of the defendant, to keep a regular account of his receipts and disbursements, when he was specially requested to do so, and in consequence thereof the defendant has been damaged by such negligence, then he is entitled to recoup such damages, and have the same deducted from the plaintiff's claim for his services as such agent and manager. *Ibid.*
3. When the landlord failed to repair the roof of the store-house, after notice of its leaky condition, and his tenant's goods were damaged thereby, the tenant is entitled to recoup the amount of such damages as against a distress warrant for the rent. *Guthman vs. Castleberry*..... 172

REGISTRY. See *Deeds*, 11.

RELEASE. See *Partnership*, 6.

RES GESTÆ. See *Criminal Law*, 28, 42.

ROADS AND BRIDGES.

1. Under the Act of December 5th, 1805, granting to the Inferior Courts of the several counties of this State, jurisdiction to authorize the establishment of bridges and ferries, etc., it was not within the powers of the Inferior Court of Floyd county to grant to any person the exclusive right to build and establish bridges upon the Coosa and Etowah rivers, for three miles from the junction of said rivers in said county, nor had the said Court or its successor, the Ordinary, under any law passed since 1805, any such authority, and the order of the Inferior Court granting the exclusive privilege contended for, is without authority and void. *Wright et al. vs. Nagle et al.*..... 367
2. When, without authority of law, a railroad company, thirty years ago, changed the public road at one of its crossings, cut out a new road, and, at some expense, built a bridge over a stream said new road crossed; and, by common consent, the old road was abandoned and the new one used by the public:
Held, That the railroad company, in the absence of any contract so to do, is not bound to keep up said bridge,

and the mere fact that the company first built it, and that it has since, at various times, repaired it, (it being near one of its depots,) does not make an implied contract with the county that the company will keep it in repair. *Brookins, Ordinary, vs. Central Railroad and Banking Company*..... 523

3. When a suit was brought against a railroad company for damages caused to the plaintiff by his falling into an excavation made by the company across the public highway, and it appeared in proof that the public highway had for years run in a particular place; that on the approach of the railroad constructors to that place, the road had been turned so as to take a different route; that within a week or ten after the change, the plaintiff, traveling the road with his wagon and team, had taken the old route, it being in the night, and had been stopped by the cut or excavation; that he had got out of his wagon to see what was the matter, and in passing to the front had fallen into the cut and broken his thigh, so as to cause him great pain, expense and loss of time, and so as to lessen his effectiveness as a working man one-fourth, for life, and so as to shorten his leg by three inches:

Held, That the burden of showing that the route of the road had been legally changed, was upon the defendant, and this could only be shown by production of the order, or by proof of such long established usage as to justify a presumption of such order. *Atlanta & R. A. L. Railroad Company vs. Wood*..... 565

RULE AGAINST OFFICER.

1. When money was raised by the sheriff under a *fi. fa.* in favor of A, against B and C, the holder of an older *fi. fa.*, placed the same in the hands of the sheriff to claim the money, and gave him notice to hold the money for distribution by the Court, and the defendant instituted proceedings under the Relief Act of 1868, to reduce the older judgment, and pending these proceedings, though under the belief that they had been abandoned, the sheriff had paid the money over to the older *fi. fa.*, which had, in the meantime, been purchased by A, the holder of the younger *fi. fa.*, and the proceedings to reduce the other judgment were afterwards abandoned by the defendants:

- Held*, That it was error in the Court, on the motion of the defendant, to direct the money thus paid upon the older *fi. fa.* to be indorsed as a credit upon the younger *fi. fa.* *Moses vs. Flewellen*..... 23
2. Two attachments were placed in the hands of a sheriff and levies made, and whilst the property was in the possession of the sheriff the defendant gave replevy bonds, the security justifying, and stated in the answer of the sheriff, to have been at the time a citizen of the State of Georgia, and no exception was taken to the bonds at the return term of the attachments; at the trial term, judgments were rendered against the principal and security, and executions placed in the hands of the sheriff, who made returns of *nulla bona*; the plaintiff petitioned the Court for a rule against the sheriff, who set up the above stated facts in his answer, and also that he had acted in good faith; the answer was not traversed. The Court did not commit error in refusing to make the rule absolute. *Nagle, adm'r, vs. Lumpkin, sheriff*..... 521

SALE. See *Railroads*, 14.

SERVICE.

1. Where an action was brought by A for the use of B, against C, and it appeared on the face of the declaration that the suit was brought for the use of B, and C acknowledged service and waived a copy of the declaration before the writ was filed:
- Held*, That the acknowledgment of service and waiver of copy, so charges C with notice of the equitable rights of B, that he cannot afterwards, before the writ is actually filed, buy up a debt against A and plead it as an offset, unless he, in some way, affirmatively makes it appear that when he did so acknowledge service, he did not know the suit was for the use of B. A mere general statement that when he bought the offset he did not know of the transfer to B, is insufficient. *Whitaker, for use, etc., vs. Pope*..... 13
2. Service of the bill of exceptions by counsel for plaintiff in error, by mailing the same addressed to the attorneys of defendants, is insufficient. *Clarke vs. Lyon et al.*..... 125

3. Where service of the bill of exceptions is perfected by counsel for plaintiff in error, such service must be authenticated by an affidavit made by such attorney at the time of the service, and attached to the bill of exceptions. *Ibid.*

SETTLEMENT. See *Judgment*, 6.

SET-OFF.

1. Where an action was brought by A for the use of B, against C, and it appeared on the face of the declaration that the suit was brought for the use of B, and C acknowledged service and waived a copy of the declaration before the writ was filed:

Held, That the acknowledgment of service and waiver of copy, so charges C with notice of the equitable rights of B, that he cannot afterwards, before the writ is actually filed, buy up a debt against A and plead it as an offset, unless he, in some way, affirmatively makes it appear that when he did so acknowledge service, he did not know the suit was for the use of B. A mere general statement that when he bought the offset he did not know of the transfer to B, is insufficient.

Whitaker, for use, etc., vs. Pope 13

2. A set-off is a cross action; a debt cannot be pleaded as a set-off, if there be at the time a suit pending against the plaintiff for the same debt in favor of one who was at the bringing of said suit the true owner of the said set-off. *Ibid.*

3. The maker of a promissory note, payable to a partnership, at sixty days, cannot set up a defense against the note that it was agreed between him and two of the partners, when the goods were bought and the note given, that it should be settled at a future time by being credited on an account held by the maker on one of those two partners, the other partner not being a party to such agreement. *Harper vs. Wrigley & Knott* 495

SHERIFF.

1. When money was raised by the sheriff under a *fi. fa.* in favor of A, against B and C, the holder of an older *fi. fa.*, placed the same in the hands of the sheriff to

- claim the money, and gave him notice to hold the money for distribution by the Court, and the defendant instituted proceedings under the Relief Act of 1868, to reduce the older judgment, and pending these proceedings, though under the belief that they had been abandoned, the sheriff had paid the money over to the older *fi. fa.*, which had, in the meantime, been purchased by A, the holder of the younger *fi. fa.*, and the proceedings to reduce the other judgment were afterwards abandoned by the defendants:
- Held*, That it was error in the Court, on the motion of the defendant, to direct the money thus paid upon the older *fi. fa.* to be indorsed, as a credit upon the younger *fi. fa.* *Moses vs. Flewellen*..... 23
2. Where, in October, 1858, the sheriff took an insufficient bail bond, and at the first term thereafter, the plaintiff proceeded to have the sheriff and his securities on his official bond, declared by the judgment of the Court, special bail for the defendant, and having obtained judgment for his debt, he proceeded by *scire facias* to make the sheriff and his securities liable as bail, but failing in this, in consequence of a plea that the defendant was dead, he appealed and dismissed the *scire facias*, and in June, 1866, commenced suit on the sheriff's official bond for failure to take bail:
- Held*, That having elected to hold the sheriff and his securities liable as bail, the plaintiff is concluded by the remedy he has chosen, and cannot now resort to the official bond of the sheriff. *Mosely, adm'x, vs. Lyon et al*..... 398
3. Two attachments were placed in the hands of a sheriff and levies made, and whilst the property was in the possession of the sheriff, the defendant gave replevy bonds, the security justifying, and stated in the answer of the sheriff to have been, at the time, a citizen of the State of Georgia, and no exception was taken to the bonds at the return term of the attachments; at the trial term, judgments were rendered against the principal and security, and executions placed in the hands of the sheriff, who made returns of *nulla bona*; the plaintiff petitioned the Court for a rule against the sheriff, who set up the above stated facts in his answer, and also that he had acted in good faith; the answer was not traversed. The Court did not commit error

- in refusing to make the rule absolute. *Nagle, adm'r, vs. Lumpkin*..... 521
4. Where, pending an action on a sheriff's bond, the sheriff and one of the securities die, the plaintiff may proceed against the surviving securities. *Bullock, Gov'r, vs. King et al.*..... 550
5. The entries on the sheriff's docket, (the sheriff being dead,) showing the payment of an execution by the security, are admissible in evidence, it being made to appear that the original executions were lost and the record of the judgment being produced. *Willingham et al. vs. Smith*..... 580

SHERIFF'S SALE. See *Judicial Sale*, 1-3.

SOUTHERN EXPRESS COMPANY.

See *Carriers*, 2-6.

SPECIFIC PERFORMANCE.

See *Equity*, 2.

“ *Landlord and Tenant*, 5.

STAMPS. See *Evidence*, 9, 10.

STATE.

When the Governor of this State, with other creditors of the Brunswick and Albany Railroad Company, filed a creditor's bill against the company, alleging that the company was insolvent, and praying the appointment of a receiver, the bill charging that the State of Georgia was interested in the assets, in so far that it was stated that certain bonds of the company were in circulation, purporting to have upon them the State's indorsement, and praying, on the part of the State, that the receiver might be appointed and the property preserved until the liability of the State should be ascertained:

Held, That the Legislature having, by law, declared that the indorsement of the bonds was illegal and void, it was not error in the Chancellor, on motion of the Governor, to dismiss the State as a party plaintiff to the bill, even if the receiver had been appointed and had

possession of the effects of the company under the order of the Court. *B. & A. R. R. Co. vs. The State* 415

STATUTE OF FRAUDS.

See *Frauds, Statute of*, 1.

STATUTE OF LIMITATIONS.

See *Limitations, Statute of*, 1-5.

SUPERSEDEAS.

1. Where five or six suits were pending in the name of the Mayor of Augusta for the use of various parties, against the principal and securities of an auctioneer's bond, the same defenses existing in each case, and one of the cases was tried and a verdict had, and the case carried to the Supreme Court of this State by bill of exceptions, with a *supersedeas*, and at the same term of the Superior Court at which this verdict was taken, the Court permitted verdicts and judgments in all the cases to be taken, and passed an order, without objection from any of the parties, directing that execution should not issue in any of said cases until the case carried to the Supreme Court was disposed of, and the case having been decided in the Supreme Court was, by writ of error, carried to the Supreme Court of the United States:

Held, That the order staying execution in said cases, not having been excepted to, is still operative until the case is disposed of by the Supreme Court of the United States, or until said order is set aside on a motion for that purpose. *Russell vs. O'Dowd et al.*; *O'Dowd vs. Russell et al* 474

2. When it appears from the papers on file with the clerk of the Superior Court of this State that, in a case carried by writ of error from this Court to the Supreme Court of the United States, proper steps have been taken to supersede the judgment, the Courts of the State have no longer jurisdiction of the case until the same is disposed of by the appellate Court, or until, by order of said Court, the execution is permitted to proceed for want of a *supersedeas* or otherwise. *Ibid*.

3. The remedy at law, by affidavit of illegality, is adequate to stop the progress of the execution, and a bill

to enjoin them was properly demurred to, as the defendant has a complete and adequate remedy at law.
Ibid.

TAX.

Before the passage of the Act of August 24, 1872, there was no authority in any officer to transfer an execution for taxes so as to entitle the transferee to enforce the same by levy and sale of the property of the defendant, *Smith vs. Mason*..... 177

TAX COLLECTOR. See *Officers*, 1, 2.

TRESPASS.

1. An action against a common carrier for negligence in the performance of his duty as a carrier, under a contract to carry, is an action upon the case *ex delicto*, and may be joined with a count in trover or trespass *vi et armis*, but if the action be for negligence alone, under the contract to carry, or if the counts in trover or trespass *vi et armis*, be abandoned, the plaintiff cannot repudiate the contract, either expressed or implied, under which the carrier received the goods, and recover for an unlawful taking. *Southern Express Company vs. Palmer & Co*..... 85
2. A carrier who receives goods to carry from one not authorized to deliver them to him, is a trespasser, and may be sued in trover for the goods, as any other illegal taker may be; but if a suit be brought against him as a carrier, charging him with having taken the goods under a contract with the plaintiff's agent, and with neglect of duty under the obligations of that contract, and there be no count for a wrongful taking or conversion, the plaintiff can only recover for a breach of duty, under the contract, as made with his agent:
3. The contract in the record between the Adams Express Company and the Southern Express Company is an express contract, signed by both parties, in which it is specifically agreed that the Southern Express Company should not be liable for "river risks" on any goods delivered to it for carriage by the Adams Express Company, and if the owner of the goods sue the Southern Express Company, not as a tortious taker,

but as a carrier under that contract for negligence, by which the goods were lost, he must abide by its terms. *Aliter*, if he sue in trover or in trespass for an illegal taking or conversion. *Ibid.*

4. The case of the *Southern Express Company vs. Shea*, 38 *Georgia Reports*, 519, and the case of the *Southern Express Company vs. Cohen & Menko*, 45 *Georgia Reports*, 148, are, as to the facts and the pleadings, similar to the present case, and must control it. *Ibid.*
5. If an action upon the case, against a common carrier for negligence, under his contract, be brought within four years, and after four years have elapsed, the plaintiff amend his writ by adding a count in trover, and a count for trespass *vi et armis*: *Query*—whether the new counts are barred? *Ibid.*
6. Since 1st of January, 1863, under section 2960 of our Revised Code, the owner of land may maintain an action for trespass thereupon, even though he have not actual possession of the same. *Atlantic & Gulf R. R. Co. vs. Fuller, trustee*..... 423
7. An action of trespass *quare clausum fregit*, which sets forth that the defendant had, without authority of law and without consent of the plaintiff, built a railroad upon the plaintiff's land, and had used and occupied it for a right of way since 1858 (more than seven years) is not demurrable, on the ground that on its face it shows the plaintiff's right to be barred by the statute of limitations. *Ibid.*
8. The owner of land taken by a railroad company for right of way is not debarred of his action for trespass, because the charter authorizes the company, in a particular way, to so appropriate the land, unless the company have pursued the mode pointed out, and thus acquired the legal right. *Ibid.*

TROVER.

1. Where the plaintiffs loaned seventeen shares of railroad stock to the defendants, upon which to borrow money, and transferred to them the title thereto, the stock to be returned on demand; and the defendants borrowed money from certain parties, transferring to them the title to the stock as collateral security with

the consent of the plaintiff, the plaintiff cannot, upon a demand on defendants therefor, maintain an action of trover for the stock, before the indebtedness to secure which it was transferred became due. *Aliter*, if the defendants had failed to meet said indebtedness at maturity. *Savage vs. Smythe & Co. et al* 562

2. Mere non-feasance is not a conversion. *Ibid.*

TRUSTS.

1. Where land was held in trust to A for life, and at her death, to her children, and the trustee sold and made a deed, as trustee, to the whole estate, A, the life tenant, entering on the deed a written consent to the making of the deed :

Held, That this sale by the trustee and consent by the life tenant was not such an act by the tenant for life as, at common law, amounted to a forfeiture, and it was error in the Court to hold that, on the making of such a deed, a right of action, based on the forfeiture, accrued to the remainderman, and that the statute of limitations commenced to run. *Bazemore vs. Davis...* 339

2. An indebtedness to authorize a sale of a trust estate must have been contracted for articles, or property, or money furnished for the use and benefit of the trust estate. *Clinch et al. vs. Ferril & Weslow et al.....* 365

3. An execution based upon a judgment against trustees which fails to specify the property to be bound for its payment, having been levied upon the trust estate, the sale will be enjoined. *Ibid.*

4. Where suit is instituted against trustees for advances alleged to have been made to one of the *cestui que trusts*, with the assent of the defendants, for the use of the trust estate, and a general judgment is taken against the trustees, and the execution based thereon is levied upon the trust estate, the *cestui que trusts* not being parties to the execution, could not file an affidavit of illegality. *Ibid.*

5. A Judge of the Superior Court in this State did not have the power, either in term or at Chambers, under the Act of 20th February, 1854, or under the provisions of any statute, or of the common law, to grant authority to a trustee to sell and convey land held by

- said trustee for an infant *cestui que trust*, unless such infant was made a party to the proceedings instituted for that purpose, by a representative properly appointed. *Hill et al. vs. Printup*..... 452
6. Where a trustee received a large sum of money in April, 1860, and in February, 1864, obtained an order from the Judge of the Superior Court, authorizing him, as trustee, to invest the fund then in his hands in Confederate money, in Confederate bonds, which was done, and the same became worthless, it was error to charge that the order of the Judge of the Superior Court was conclusive proof that it was trust money which was so ordered to be invested. *Westbrook, trustee, vs. Davis et al., adm'r*..... 471
7. When a trustee has received Confederate money during the war in the discharge of his legal duty, when it was the common currency of the country, in good faith, when prudent business men were receiving it, he will be protected, but the facts and circumstances under which it was received, must be clearly and satisfactorily shown as evidence of that good faith and the fairness of the transaction. *Ibid.*
8. If a trustee violates the law in the discharge of his duties, he is responsible for such violation, no matter how honestly he may have acted. *Ibid.*
9. By a marriage settlement a trustee was appointed, and the property vested in him for the use of the wife, with power in the wife to dispose of the property by will, and if she died leaving children and without executing a will, then to those children and their legal representatives in equal degree. The trustee brought ejectment for a portion of the trust property laying a demise in his name as trustee for the wife and children. Pending the action the wife died:
Held, That the action did not abate, but that the same may be prosecuted for the recovery of the property, so that the trustee may be enabled to execute the trust by turning over the possession to those who may be entitled, and to that end may make such amendment and add such demises as may be necessary to make the children formal parties. *Findlay et al. vs. Artope, trustee*..... 537

10. If a guardian purchase land, intending to receive a promissory note on other parties, from an administrator, in whose hands is the estate in which his ward has a share, and to pay for the land with such note, the consideration of which, is the purchase money of the same land when sold by the administrator, and he does receive the note from the administrator as the portion of the ward in said estate, and pays the whole price of the land with it, and takes the title to himself, it will so charge the land as a trust in the hands of the guardian, and his vendee who purchases with notice of such facts, as to entitle the ward through her next friend to assert her right of election between the fund thus appropriated, and the land thus purchased and paid for. *Johnston vs. Janes et al.*..... 554
11. In one item of a will executed in 1840, (the testator dying shortly afterwards) property is given to his executors in trust for all the children of testator—including a married daughter, and the husband of such daughter being one of the executors—"for their sole and separate use during their natural lives and to remain to their children after their death;" and in the next item of the will two of said executors (omitting the husband,) are appointed trustees for said married daughter, and it is immediately added, "and that her estate be held by them for the sole use and benefit of the heirs of her body:"
- Held*, That both items will be considered in construing what estate was intended to be given to such daughter, and that an estate in trust for her sole and separate use is thereby created, and is not subject to levy and sale for the debts of her husband. *Clarke, ex'r, vs. Harker* ... 596

UNITED STATES COURTS.

1. The judgment of a District Court of the United States, having jurisdiction of the parties and the subject matter of the judgment, is conclusive between the parties in a State Court, upon the merits of the matter adjudged, but the jurisdiction of the Court is always open to inquiry. *McCauley vs. Hargroves*..... 50
2. Where there is nothing in the action of the Court to show that the defendant was notified, and the judgment upon its face shows that the defendant did not

appear, and the return of the marshal is without any formal venue, and does not state where the defendant was served, it is competent for the defendant in a suit on the judgment in a State Court, to show that the service was effected out of the territorial jurisdiction of the marshal, and when he had no authority to effect service. *Ibid.*

USURY.

1. Where a party is solicited to make a loan, and to procure the means of so doing must spend time and incur trouble and expense in collecting the same from others, and does this at the request of the borrower, and upon his agreement to pay for such services and expenses, the transaction is not usurious. *Atlanta M. & R. M. Co. vs. Gwyer*..... 9
2. Where an excess over the legal interest is paid for other good and valuable consideration beyond the mere use of money, it is not usury. *Ibid.*
3. One creditor holding a common law judgment, where the debtor is involved or unable to pay all his debts, cannot enjoin another creditor in a common law judgment older than the first, on the ground that the latter has received from the debtor a sufficient amount of usury to discharge his existing judgment, and, from that fact, ask a decree, either that such judgment be declared satisfied, or postponed until the senior judgment is paid. *Phillips et al. vs. Walker*..... 55
4. Although a plea of usury does not "set forth the sum upon which it was paid, or to be paid, the time when the contract was made, where payable, and the amount of usury agreed upon," etc., as required by section 3419 of the Code, yet if it does state the rate per cent. of interest which was agreed to be paid, and that the usury in the contract sued on amounts to as much as is due on the contract, and no demurrer or exception is taken to the plea, it is error in the Court to charge the jury that because the plea does not set forth the foregoing specifications they cannot consider it. *Seisel & Bro. vs. Harris*..... 652
5. Money was loaned at usurious rates to a firm composed of A, B and C, and a mortgage given by the borrowers on their stock of goods to secure the debt.

The mortgage was foreclosed, and the *fi. fa.* was about being levied on the goods, when the mortgagors, insisting upon indulgence being given them, and threatening to raise the question of usury against the debt, it was agreed that the mortgage should be given up, a portion of the debt be paid in cash and the balance in three installments. The notes of A and B, who had formed a new partnership, (C having withdrawn and left the State,) were given for these installments. One of these notes being paid, suit is brought on the other two:

Held, That the contracts sued on are not purged of usury.
Ibid.

VENDOR AND PURCHASER.

1. Where a party enters upon land under a contract of purchase, the relation of landlord and tenant does not exist, and the vendee, upon failure to pay the purchase money according to his contract, cannot be dispossessed as a tenant at sufferance. *Brown vs. Persons*..... 60
2. Whilst, as a general rule, it is true that one who goes into possession of land under a contract of purchase, cannot, at law, dispute the title of his vendor, so long as his possession is undisturbed, yet if the vendor himself parts with the title, or if it be sold under execution against him, the vendee may, in good faith, attorn to the purchaser, and in an action of ejectment by the vendor against the vendee, the vendee may, though the purchase money is still unpaid, show such sale and attornment as a defense to the action. *Beall et al. vs. Davenport et al.*..... 165
3. Under section 3525 of the Code, it is necessary that the purchaser of real property should be in the possession of the same four years, before it can be discharged from the lien of a judgment against the person from whom he purchased. *Glanton et al., ex'rs, vs. Heard et al.*... 410
4. Where land is leased for a term of years, and the lessee places improvements thereon, and, before the expiration of the lease, sells said improvements and his interest under the lease to the lessor, taking a note in part payment therefor, the lessee is not entitled to a vendor's lien upon the land for the amount of the note. *Mitchell vs. Printup*..... 455

5. Where possession in the vendor after the sale, was claimed as a badge of fraud, it was competent for a witness to testify that she heard the vendee, some time after the sale, say to the vendor, "he might have possession of the house free of rent if he would pay taxes and keep up repairs." Although no reply was proven to have been made to the proposition, the fact that the vendor did continue in possession for several years, entitled the party offering the evidence to have it to go to the jury for what it was worth. *Willingham et al. vs. Smith*..... 580
6. If C was in possession of land at the time S purchased it, that fact was at least constructive notice to the purchaser, and was sufficient to have put him upon inquiry as to the character and extent of C's claim. *Cogan vs. Christie et al.*..... 585
7. Under section 3027 of Irwin's Revised Code, authorizing parties having equitable causes of action to institute proceedings for their recovery on the law side of the Superior Court, it is not competent for a plaintiff in execution on the trial of an issue, made upon an affidavit of a "claimant" of a tract of land levied on by the *fi. fa.*, to enlarge and change the issue by alleging that, though the land is not subject to the execution, yet it was bought by the claimant from the defendant, with full notice that the purchase money for the same was still due to the plaintiff, and that the land is therefore subject to the vendor's lien for the purchase money, which is the debt on which the judgment levied is founded. The amendment is not sufficiently germane to the issue formed under our claim laws to justify it. *Cox vs. Wadsworth*... 619

VENUE.

1. The evidence failing to show where the offense was committed, a new trial will be granted. *Carter & Meriwether vs. The State*..... 43
2. A foreign corporation transacting business in this State, may be garnished for a debt it may owe anywhere in this State, where suit for such debt could be brought. *Selma, R. and D. Railroad Company vs. Tyson*..... 351

to enjoin them was properly demurred to, as the defendant has a complete and adequate remedy at law.
Ibid.

TAX.

Before the passage of the Act of August 24, 1872, there was no authority in any officer to transfer an execution for taxes so as to entitle the transferee to enforce the same by levy and sale of the property of the defendant, *Smith vs. Mason* 177

TAX COLLECTOR. See *Officers*, 1, 2.

TRESPASS.

1. An action against a common carrier for negligence in the performance of his duty as a carrier, under a contract to carry, is an action upon the case *ex delicto*, and may be joined with a count in trover or trespass *vi et armis*, but if the action be for negligence alone, under the contract to carry, or if the counts in trover or trespass *vi et armis*, be abandoned, the plaintiff cannot repudiate the contract, either expressed or implied, under which the carrier received the goods, and recover for an unlawful taking. *Southern Express Company vs. Palmer & Co* 85
2. A carrier who receives goods to carry from one not authorized to deliver them to him, is a trespasser, and may be sued in trover for the goods, as any other illegal taker may be; but if a suit be brought against him as a carrier, charging him with having taken the goods under a contract with the plaintiff's agent, and with neglect of duty under the obligations of that contract, and there be no count for a wrongful taking or conversion, the plaintiff can only recover for a breach of duty, under the contract, as made with his agent:
3. The contract in the record between the Adams Express Company and the Southern Express Company is an express contract, signed by both parties, in which it is specifically agreed that the Southern Express Company should not be liable for "river risks" on any goods delivered to it for carriage by the Adams Express Company, and if the owner of the goods sue the Southern Express Company, not as a tortious taker,

be an election, there must be an intent to look to an ascertained principal alone for payment to constitute an election," it was not error—the more especially when the whole charge is looked to in connection with the evidence on this point in this case. *Ibid.*

3. When the Court fully and distinctly leaves the questions as to agency and election to the jury, it was not error—at least not such error as to authorize a new trial, for the Court to have refused to allow a witness to testify: "That after the presentation of the account to A. B. (the alleged principal) by the attorney of defendant, which fact was known to the executor of the purchaser of the cotton, the executor paid to A. B. about \$8,000 00 due by the testator to A. B. on a guaranty." *Ibid.*
4. Such evidence may exhibit the equity of the principle why an election should discharge the agent, but it would not tend to establish the point in issue, as against the creditor, to-wit: Had he made an election? *Ibid.*
5. Under a warehouseman's receipt as follows: "Received from W. U. Garrard, one hundred and twenty-seven bales of cotton, marked, numbered, etc., as per margin, (the marks, etc., being given) subject to this receipt only, on paying customary charges and all advances, acts of Providence and fires excepted," the warehouseman has not only a lien on the cotton, but the consignor is liable for the customary charges that may accrue, and his liability continues until he may sell and give notice to the warehouseman, unless he be discharged by the act or consent of the warehouseman. *Ibid.*
6. Where M. had cotton stored at a warehouse, and sold forty-three bales to Y. for himself, and fifty-six bales to him as the agent of E., and one hundred and seven bales to him as the agent of W., and the bills for the cotton being made to Y., because he told M. that he would pay the storage, and the question on trial was whether Y. was responsible for the storage of any more of the cotton than the forty-three bales purchased for himself:

Held, That this depends upon the fact whether the credit was given to Y. for the storage of the entire lot, or whether any part of it was stored on the credit of E. or W. *Young vs. Moody*.....

7. Where warehousemen are sued for damages incurred from the loss of cotton in weight, it is incumbent upon the plaintiff to show that such loss accrued from the negligence and want of proper care on the part of the defendants. *Cunningham vs. Franklin, Read & Co...* 531

WILLS.

1. A testator directs his executor "to pay an annual sum of \$500 00 to his wife, out of the net income of his estate, in semi-annual installments." In another item of his will he refers to this bequest as an "annuity devised to his wife." Nothing else in the will defines or limits the term of years during which it is to be paid. In four several items of his will he further gives, after deducting the foregoing annuity, one-fourth of the annual income arising from his estate to four several sets of legatees. For three of said shares in the income trustees are appointed. The fourth share is to be paid on certain conditions, with a remainder created therein. No time is appointed for the distribution of the estate, or the payment of any share thereof, except as to the income. The widow applied for dower in the land and the same was assigned to her. Subsequently she executed an agreement with the legatees whereby she relinquished her dower "to the estate and legatees," on condition that the legatees paid her *during her life* the annuity given her by the will, and agreeing that the estate might be distributed, but the relinquishment to be void if the Courts would not decree a distribution. This the legatees and the trustees appointed in the will agreed in writing to do. The executor was one of the trustees. The beneficiaries of the trusts are *femes covert*, and their children born and to be born. The executor filed a bill in chancery alleging the foregoing facts, further stating that the conditions on which the fourth share in the annual income was to be paid had happened, and asked the direction of the Chancellor as to the execution of the will, that the property might be divided and turned over to the legatees and trustees "on the same basis, terms, conditions and limitations as the annual income had been given," etc., and that the right of the widow to the annuity might be secured by a proper decree. To this bill the widow, the trustees, etc., were parties, and their answers admitted the facts as stated and joined

with the executor in asking the decree prayed for. On the hearing, the Court, after the reading of the bill and answers, dismissed the bill for want of equity:

Held, That the rights of the annuitant, under the agreement, and the liabilities of the respective shares for its payment, the condition attached to the relinquishment of dower, and the beneficiaries of said relinquishment and of the estate being mostly *femes covert* and children born and to be born, and who take the estate through trustees, make this a proper case for invoking the aid and direction of a Court of equity, in order that the rights of all parties may be finally adjudicated, and all doubt as to the proper construction of the will, and as to the time when the distribution of the estate can be made, may be removed, this Court holding that the gift or bequest of the income carries with it the *corpus*, under the limitations provided in the will.

Hill, ex'r, vs. Clarke et al...... 526

2. When it is directed in a will that the estate of the testator shall be equally divided between his five children "after deducting a portion off of the shares of William J. and Caroline E." equal to what had been advanced to them, and it appears from an agreed statement of the facts, that the executor (the only one surviving) came into the possession of a certain lot, in the city of Augusta, as such executor, and as the property of the testator, and that the will had not been executed as to this lot and other property of the estate:

Held, That the interest William J. and Caroline E. may have in said lot is not subject to levy and sale under a judgment and execution obtained against said William J., and the husband of Caroline E., for a debt due from them. *Clarke, ex'r, vs. Harker*..... 596

3. In one item of a will executed in 1840, (the testator dying shortly afterwards) property is given to his executors in trust for all the children of testator—including a married daughter, and the husband of such daughter being one of the executors—"for their sole and separate use during their natural lives and to remain to their children after their death;" and in the next item of the will two of said executors (omitting the husband,) are appointed trustees for said married daughter, and it is immediately added, "and that her

estate be held by them for the sole use and benefit of the heirs of her body:"

Held, That both items will be considered in construing what estate was intended to be given to such daughter, and that an estate in trust for her sole and separate use is thereby created and is not subject to levy and sale for the debts of her husband. *Ibid*.

4. In 1862, Roath purchased lot number forty-five, in the city of Augusta, with a front of sixty feet, and running from Ellis to Greene street, and was residing on it when, in March, 1866, he purchased lot number forty-four, a vacant lot adjacent to number forty-five, of the same front and running the same length as number forty-five. He used part of lot forty-four as a flower garden, and part as a vegetable garden. There was a fence around both lots, and a fence divided them when Roath purchased forty-four, and the evidence is conflicting as to the time when the dividing fence was taken down by Roath, whether it was before or after the execution of his will. In September, 1866, Roath made his will, and in one item "devised and bequeathed my house and lot on Ellis street, in the city of Augusta, where I now reside, to my wife for her natural life, and after her death, to my two nieces, M. and S. B. Crocker." In another item, he gave all the balance of his estate, real and personal, to his wife, absolutely. Testator died in November, 1867:

Held, That the acts and sayings of Roath, which go to show that, at the time of the execution of the will, he considered and treated the two lots as one and as constituting the house and lot where he then resided, are competent as evidence in behalf of the remaindermen in an action of ejectment brought after the death of the wife of Roath to recover lot number forty-four.

McElrath vs. Haley et al..... 641

WITNESS.

1. Where the Court charged the jury "that if there is a theory on which the case can be placed, and all of the witnesses speak the truth, that is the true theory, and it is your duty to adopt it. If there is a basis on which you can put the case, and all the witnesses speak the truth, it is your duty to adopt that as true," and immediately adds, "but if this cannot be done, and the

testimony cannot be so reconciled, then look to the witnesses. See what is true and what false. You are exclusive judges of this, and in passing upon it, you judge it not in detached portions, but determine the truth or falsehood of each fact by the light of all the testimony in the case. Take each witness as he appears, and is presented to you by this record—by this testimony—as he appeared to you on the stand, and as his statements appeared before you, and from other witnesses in the case, determine who is to be believed, what portion is to be believed and what rejected :”

- Held*, That this charge was not error ; and it placed no illegal limitation on the right of the jury to disbelieve any testimony or any witness, which, under the law and the evidence, they had the privilege to reject as unworthy of credit. *Oneil vs. The State*..... 66
2. It is not competent to show by a witness, for the purpose of degrading and impeaching him, that he had, during the term of the Court then in session, pleaded guilty to a criminal offense. The record of the plea of guilty was the highest and best evidence. *Johnson vs. The State*..... 116
3. Where the defendant is security upon a note, and is the administrator of the maker, and is sued in both characters, the plaintiff is an incompetent witness. *Dixon, adm'r, et al. vs. Edwards*..... 142
4. Where the Court charged the jury, “that every witness in the case is to be believed until impeached in some one of the modes known to the law. A jury cannot arbitrarily, of their own motion, set aside the evidence of any witness ; the presumption of innocence attaches to witnesses which remains until removed by proof,” and there was no impeaching evidence, unless the statement of the defendant not under oath shall be considered as such, in reference to which the Court charged the jury, “that they were the exclusive judges of the weight that was due to such statement,” the charge was not erroneous. *Jones vs. The State*,..... 163
5. When, on a trial for seduction, the female alleged to have been seduced was the sole witness to the principal facts, and in her evidence she declared that for two years after the alleged seduction before the trial, she had lived a life disclosing great moral turpitude, hy-

pocrisy, and the Court was asked, in writing, to charge the jury that one ground for disbelieving a female witness was, that if the witness disclosed in her testimony acts done by her and habits of life pursued by her which exhibit moral turpitude in herself, and the Judge refused :

Held, That this was error, and the fact that the prisoner on trial is charged to have been the cause of said acts, and to have joined in them does not alter the rule.

Wood vs. The State 192

6. George K. Smith executed a deed to George Hamilton, and afterwards died. Hamilton conveyed the property by deed, after Smith's death, to his widow. The property was levied on as Smith's property, after his death, and sold by the sheriff, by virtue of an execution issued against Smith in his lifetime, and bought by Willingham, who went into possession. Mrs. Smith brought ejectment. The issue was made by the defendant, Willingham, that Smith's deed to Hamilton, who was his father-in-law, was fraudulent and void. One badge of fraud alleged was continued possession of the property in Smith after making the deed to Hamilton :

Held, That Mrs. Smith, not being a party to the cause of action, the other party to which was dead, nor the administrator or executor of George K. Smith being a party to the suit pending, she was a competent witness for herself on the trial of the ejectment. *Willingham*

et al. vs. Smith..... 580



The mortgage was foreclosed, and the *fi. fa.* was about being levied on the goods, when the mortgagors, insisting upon indulgence being given them, and threatening to raise the question of usury against the debt, it was agreed that the mortgage should be given up, a portion of the debt be paid in cash and the balance in three installments. The notes of A and B, who had formed a new partnership, (C having withdrawn and left the State,) were given for these installments. One of these notes being paid, suit is brought on the other two:

Held, That the contracts sued on are not purged of usury.
Ibid.

VENDOR AND PURCHASER.

1. Where a party enters upon land under a contract of purchase, the relation of landlord and tenant does not exist, and the vendee, upon failure to pay the purchase money according to his contract, cannot be dispossessed as a tenant at sufferance. *Brown vs. Persons*..... 60
2. Whilst, as a general rule, it is true that one who goes into possession of land under a contract of purchase, cannot, at law, dispute the title of his vendor, so long as his possession is undisturbed, yet if the vendor himself parts with the title, or if it be sold under execution against him, the vendee may, in good faith, attorn to the purchaser, and in an action of ejectment by the vendor against the vendee, the vendee may, though the purchase money is still unpaid, show such sale and attornment as a defense to the action. *Beall et al. vs. Davenport et al.*..... 165
3. Under section 3525 of the Code, it is necessary that the purchaser of real property should be in the possession of the same four years, before it can be discharged from the lien of a judgment against the person from whom he purchased. *Glanton et al., ex'rs, vs. Heard et al.*... 410
4. Where land is leased for a term of years, and the lessee places improvements thereon, and, before the expiration of the lease, sells said improvements and his interest under the lease to the lessor, taking a note in part payment therefor, the lessee is not entitled to a vendor's lien upon the land for the amount of the note. *Mitchell vs. Printup*..... 455

5. Where possession in the vendor after the sale, was claimed as a badge of fraud, it was competent for a witness to testify that she heard the vendee, some time after the sale, say to the vendor, "he might have possession of the house free of rent if he would pay taxes and keep up repairs." Although no reply was proven to have been made to the proposition, the fact that the vendor did continue in possession for several years, entitled the party offering the evidence to have it to go to the jury for what it was worth. *Willingham et al. vs. Smith*..... 580
6. If C was in possession of land at the time S purchased it, that fact was at least constructive notice to the purchaser, and was sufficient to have put him upon inquiry as to the character and extent of C's claim. *Cogan vs. Christie et al.*..... 585
7. Under section 3027 of Irwin's Revised Code, authorizing parties having equitable causes of action to institute proceedings for their recovery on the law side of the Superior Court, it is not competent for a plaintiff in execution on the trial of an issue, made upon an affidavit of a "claimant" of a tract of land levied on by the *fi. fa.*, to enlarge and change the issue by alleging that, though the land is not subject to the execution, yet it was bought by the claimant from the defendant, with full notice that the purchase money for the same was still due to the plaintiff, and that the land is therefore subject to the vendor's lien for the purchase money, which is the debt on which the judgment levied is founded. The amendment is not sufficiently germane to the issue formed under our claim laws to justify it. *Cox vs. Wadsworth*... 619

VENUE.

1. The evidence failing to show where the offense was committed, a new trial will be granted. *Carter & Meriwether vs. The State*..... 43
2. A foreign corporation transacting business in this State, may be garnished for a debt it may owe anywhere in this State, where suit for such debt could be brought. *Selma, R. and D. Railroad Company vs. Tyson*..... 351

VERDICT.

The verdict, under the law, if they did not intend that the punishment of death should be commuted, should have been a verdict of guilty generally. If the jury did intend, by their verdict, that the penalty of death should be commuted to imprisonment for life in the penitentiary, then, under the law, they should have so recommended. The recommendation of the prisoner to the mercy of the Court did not authorize the Court, under the law, to commute the penalty of death. The verdict, therefore, under the law applicable to this class of cases, in which the penalty of death may be commuted, was an illegal verdict, and should be set aside. *Johnson vs. The State*..... 116

WAIVER.

1. A member of a chartered company may, by his acquiescence or presumed assent, become bound by the acts of his company, and thereby be disabled from setting them up as a defense, when he could have so set them up were it not for such presumed ratification. *May vs. Mem. B. Railroad Company*..... 109
2. The acknowledgment of service of the citation was no waiver of the jurisdiction, and as Hitchcock did not appear or plead to the citation, the judgment was void, and the remedy by affidavit of illegality may be used to make the question of jurisdiction. *Jackson vs. Hitchcock*..... 491

WAREHOUSEMAN.

1. The purchaser of cotton, who stores the same with a warehouseman, is liable for the storage, notwithstanding he is the agent of a third party in making the purchase, unless he disclose the fact of his agency, and his principal to the warehouseman. *Garrard, ex'r, vs. Moody*..... 96
2. If, after such storage, the bailee ascertained the agency, and elected to go on the principal for his claim for storage he would be bound by such election; and when the Court charged this principle, and further charged, that, "To make inquiries as to whether the principal be liable, to request that his accounts be forwarded to the principal to ascertain if he will pay them, will not

be an election, there must be an intent to look to an ascertained principal alone for payment to constitute an election," it was not error—the more especially when the whole charge is looked to in connection with the evidence on this point in this case. *Ibid.*

3. When the Court fully and distinctly leaves the questions as to agency and election to the jury, it was not error—at least not such error as to authorize a new trial, for the Court to have refused to allow a witness to testify: "That after the presentation of the account to A. B. (the alleged principal) by the attorney of defendant, which fact was known to the executor of the purchaser of the cotton, the executor paid to A. B. about \$8,000 00 due by the testator to A. B. on a guaranty." *Ibid.*
4. Such evidence may exhibit the equity of the principle why an election should discharge the agent, but it would not tend to establish the point in issue, as against the creditor, to-wit: Had he made an election? *Ibid.*
5. Under a warehouseman's receipt as follows: "Received from W. U. Garrard, one hundred and twenty-seven bales of cotton, marked, numbered, etc., as per margin, (the marks, etc., being given) subject to this receipt only, on paying customary charges and all advances, acts of Providence and fires excepted," the warehouseman has not only a lien on the cotton, but the consignor is liable for the customary charges that may accrue, and his liability continues until he may sell and give notice to the warehouseman, unless he be discharged by the act or consent of the warehouseman. *Ibid.*
6. Where M. had cotton stored at a warehouse, and sold forty-three bales to Y. for himself, and fifty-six bales to him as the agent of E., and one hundred and seven bales to him as the agent of W., and the bills for the cotton being made to Y., because he told M. that he would pay the storage, and the question on trial was whether Y. was responsible for the storage of any more of the cotton than the forty-three bales purchased for himself:

Held, That this depends upon the fact whether the credit was given to Y. for the storage of the entire lot, or whether any part of it was stored on the credit of E. or W. *Young vs. Moody*..... 498

7. Where warehousemen are sued for damages incurred from the loss of cotton in weight, it is incumbent upon the plaintiff to show that such loss accrued from the negligence and want of proper care on the part of the defendants. *Cunningham vs. Franklin, Read & Co...* 531

WILLS.

1. A testator directs his executor "to pay an annual sum of \$500 00 to his wife, out of the net income of his estate, in semi-annual installments." In another item of his will he refers to this bequest as an "annuity devised to his wife." Nothing else in the will defines or limits the term of years during which it is to be paid. In four several items of his will he further gives, after deducting the foregoing annuity, one-fourth of the annual income arising from his estate to four several sets of legatees. For three of said shares in the income trustees are appointed. The fourth share is to be paid on certain conditions, with a remainder created therein. No time is appointed for the distribution of the estate, or the payment of any share thereof, except as to the income. The widow applied for dower in the land and the same was assigned to her. Subsequently she executed an agreement with the legatees whereby she relinquished her dower "to the estate and legatees," on condition that the legatees paid her *during her life* the annuity given her by the will, and agreeing that the estate might be distributed, but the relinquishment to be void if the Courts would not decree a distribution. This the legatees and the trustees appointed in the will agreed in writing to do. The executor was one of the trustees. The beneficiaries of the trusts are *femes covert*, and their children born and to be born. The executor filed a bill in chancery alleging the foregoing facts, further stating that the conditions on which the fourth share in the annual income was to be paid had happened, and asked the direction of the Chancellor as to the execution of the will, that the property might be divided and turned over to the legatees and trustees "on the same basis, terms, conditions and limitations as the annual income had been given," etc., and that the right of the widow to the annuity might be secured by a proper decree. To this bill the widow, the trustees, etc., were parties, and their answers admitted the facts as stated and joined

with the executor in asking the decree prayed for. On the hearing, the Court, after the reading of the bill and answers, dismissed the bill for want of equity:

Held, That the rights of the annuitant, under the agreement, and the liabilities of the respective shares for its payment, the condition attached to the relinquishment of dower, and the beneficiaries of said relinquishment and of the estate being mostly *femes covert* and children born and to be born, and who take the estate through trustees, make this a proper case for invoking the aid and direction of a Court of equity, in order that the rights of all parties may be finally adjudicated, and all doubt as to the proper construction of the will, and as to the time when the distribution of the estate can be made, may be removed, this Court holding that the gift or bequest of the income carries with it the *corpus*, under the limitations provided in the will.

Hill, ex'r, vs. Clarke et al...... 526

2. When it is directed in a will that the estate of the testator shall be equally divided between his five children "after deducting a portion off of the shares of William J. and Caroline E." equal to what had been advanced to them, and it appears from an agreed statement of the facts, that the executor (the only one surviving) came into the possession of a certain lot, in the city of Augusta, as such executor, and as the property of the testator, and that the will had not been executed as to this lot and other property of the estate:

Held, That the interest William J. and Caroline E. may have in said lot is not subject to levy and sale under a judgment and execution obtained against said William J., and the husband of Caroline E., for a debt due from them. *Clarke, ex'r, vs. Harker*..... 596

3. In one item of a will executed in 1840, (the testator dying shortly afterwards) property is given to his executors in trust for all the children of testator—including a married daughter, and the husband of such daughter being one of the executors—"for their sole and separate use during their natural lives and to remain to their children after their death;" and in the next item of the will two of said executors (omitting the husband,) are appointed trustees for said married daughter, and it is immediately added, "and that her

estate be held by them for the sole use and benefit of the heirs of her body:”

Held, That both items will be considered in construing what estate was intended to be given to such daughter, and that an estate in trust for her sole and separate use is thereby created and is not subject to levy and sale for the debts of her husband. *Ibid*.

4. In 1862, Roath purchased lot number forty-five, in the city of Augusta, with a front of sixty feet, and running from Ellis to Greene street, and was residing on it when, in March, 1866, he purchased lot number forty-four, a vacant lot adjacent to number forty-five, of the same front and running the same length as number forty-five. He used part of lot forty-four as a flower garden, and part as a vegetable garden. There was a fence around both lots, and a fence divided them when Roath purchased forty-four, and the evidence is conflicting as to the time when the dividing fence was taken down by Roath, whether it was before or after the execution of his will. In September, 1866, Roath made his will, and in one item “devised and bequeathed my house and lot on Ellis street, in the city of Augusta, where I now reside, to my wife for her natural life, and after her death, to my two nieces, M. and S. B. Crocker.” In another item, he gave all the balance of his estate, real and personal, to his wife, absolutely. Testator died in November, 1867:

Held, That the acts and sayings of Roath, which go to show that, at the time of the execution of the will, he considered and treated the two lots as one and as constituting the house and lot where he then resided, are competent as evidence in behalf of the remaindermen in an action of ejectment brought after the death of the wife of Roath to recover lot number forty-four.
McElrath vs. Haley et al..... 641

WITNESS.

1. Where the Court charged the jury “that if there is a theory on which the case can be placed, and all of the witnesses speak the truth, that is the true theory, and it is your duty to adopt it. If there is a basis on which you can put the case, and all the witnesses speak the truth, it is your duty to adopt that as true,” and immediately adds, “but if this cannot be done, and the

testimony cannot be so reconciled, then look to the witnesses. See what is true and what false. You are exclusive judges of this, and in passing upon it, you judge it not in detached portions, but determine the truth or falsehood of each fact by the light of all the testimony in the case. Take each witness as he appears, and is presented to you by this record—by this testimony—as he appeared to you on the stand, and as his statements appeared before you, and from other witnesses in the case, determine who is to be believed, what portion is to be believed and what rejected :”

- Held*, That this charge was not error ; and it placed no illegal limitation on the right of the jury to disbelieve any testimony or any witness, which, under the law and the evidence, they had the privilege to reject as unworthy of credit. *Oneil vs. The State*..... 66
2. It is not competent to show by a witness, for the purpose of degrading and impeaching him, that he had, during the term of the Court then in session, pleaded guilty to a criminal offense. The record of the plea of guilty was the highest and best evidence. *Johnson vs. The State*..... 116
3. Where the defendant is security upon a note, and is the administrator of the maker, and is sued in both characters, the plaintiff is an incompetent witness. *Dixon, adm'r, et al. vs. Edwards*..... 142
4. Where the Court charged the jury, “that every witness in the case is to be believed until impeached in some one of the modes known to the law. A jury cannot arbitrarily, of their own motion, set aside the evidence of any witness ; the presumption of innocence attaches to witnesses which remains until removed by proof,” and there was no impeaching evidence, unless the statement of the defendant not under oath shall be considered as such, in reference to which the Court charged the jury, “that they were the exclusive judges of the weight that was due to such statement,” the charge was not erroneous. *Jones vs. The State*,..... 163
5. When, on a trial for seduction, the female alleged to have been seduced was the sole witness to the principal facts, and in her evidence she declared that for two years after the alleged seduction before the trial, she had lived a life disclosing great moral turpitude, hy-

pocrisy, and the Court was asked, in writing, to charge the jury that one ground for disbelieving a female witness was, that if the witness disclosed in her testimony acts done by her and habits of life pursued by her which exhibit moral turpitude in herself, and the Judge refused:

Held, That this was error, and the fact that the prisoner on trial is charged to have been the cause of said acts, and to have joined in them does not alter the rule.

Wood vs. The State 192

6. George K. Smith executed a deed to George Hamilton, and afterwards died. Hamilton conveyed the property by deed, after Smith's death, to his widow. The property was levied on as Smith's property, after his death, and sold by the sheriff, by virtue of an execution issued against Smith in his lifetime, and bought by Willingham, who went into possession. Mrs. Smith brought ejectment. The issue was made by the defendant, Willingham, that Smith's deed to Hamilton, who was his father-in-law, was fraudulent and void. One badge of fraud alleged was continued possession of the property in Smith after making the deed to Hamilton:

Held, That Mrs. Smith, not being a party to the cause of action, the other party to which was dead, nor the administrator or executor of George K. Smith being a party to the suit pending, she was a competent witness for herself on the trial of the ejectment. *Willingham et al. vs. Smith*..... 580





